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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted]2

No. [redacted]245

INTERSTATE COMMERCE COMMISSION, PLAINTIFF IN ERROR,

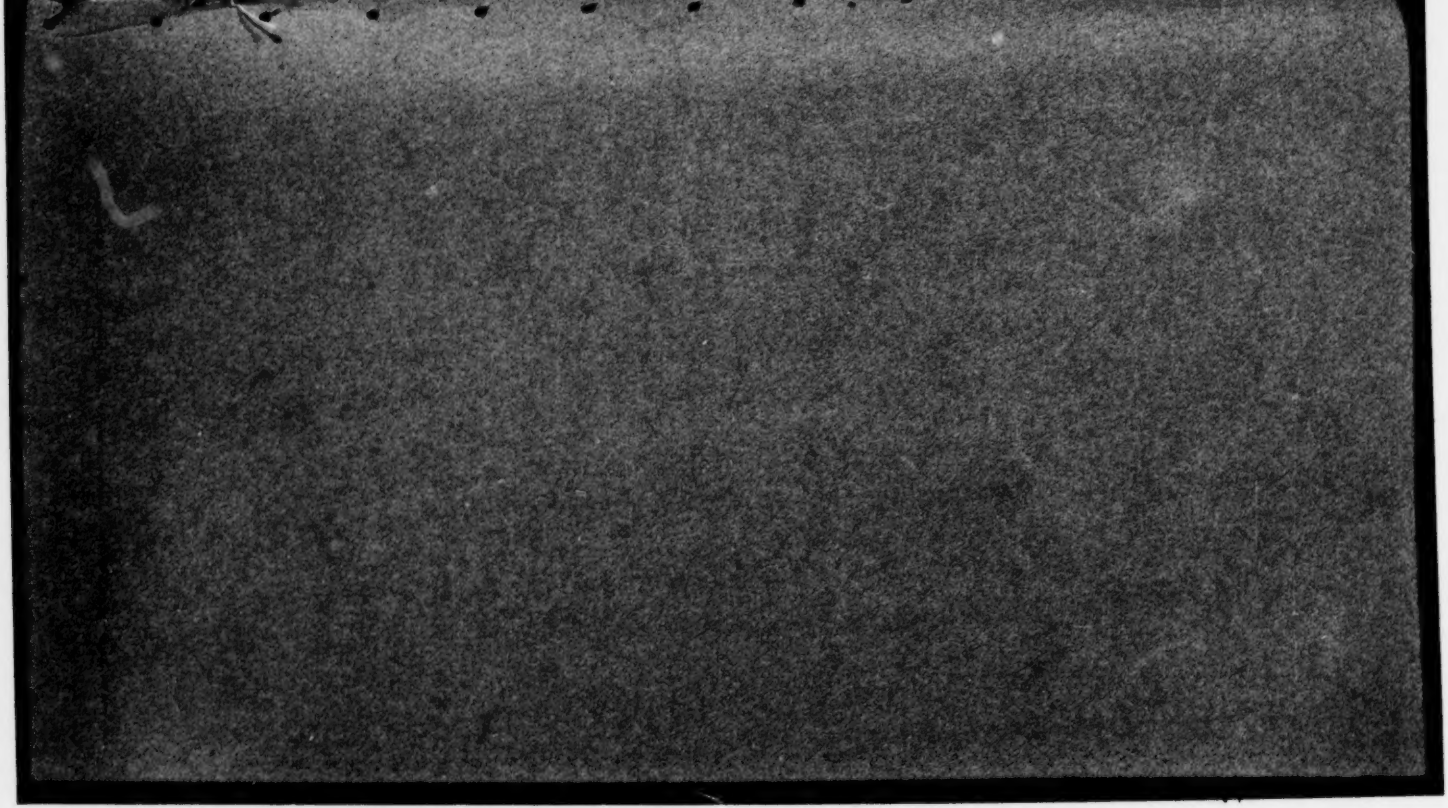
vs.

THE UNITED STATES OF AMERICA, EX REL. MEMBERS OF THE WASTE MERCHANTS ASSOCIATION OF NEW YORK, VOLUNTARY ASSOCIATION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 31, 1923.

(28689)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 684.

INTERSTATE COMMERCE COMMISSION, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, EX REL. MEMBERS OF THE WASTE MERCHANTS ASSOCIATION OF NEW YORK, VOLUNTARY ASSOCIATION.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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87635—22——1

1 Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE WASTE Merchants Association of New York, a voluntary association, appellants,
vs.
INTERSTATE COMMERCE COMMISSION. } No. 3498.

Supreme Court of the District of Columbia.

At law.

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE WASTE Merchants Association of New York, a voluntary association, petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 64361.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition for mandamus.

Filed October 4, 1920.

In the Supreme Court of the District of Columbia.

At law.

2 UNITED STATES OF AMERICA EX REL. MEMBERS OF THE Waste Merchants Association of New York, a voluntary association, petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, RESPONDENT. } No. 64361.

To the Supreme Court of the District of Columbia, holding a District Court:

Petitioners respectfully show unto this court as follows:

I.

That they are advised that this honorable court has original jurisdiction in mandamus for and in respect to matters and things in this petition hereinafter set forth.

II.

That petitioners are paper stock dealers and are the following-named partnerships, corporations, and individuals:
Atterbury Brothers, Inc., 145 Nassau Street;
Atterbury & McKelvey, Inc., 145 Nassau Street;
American Wood Pulp Corporation, 347 Madison Avenue;
Ira L. Beebe & Company, 132 Nassau Street;
Nat. E. Berzen, 309 Water Street;
E. Butterworth & Company, 132 Nassau Street;
Box Board & Lining Company, 10 Grand Street;
Castle, Gottheil & Overton, 200 Fifth Avenue;
Chase & Norton, Inc., 277 Water Street;
George Carrizzo & Company, 424 Third Ave., Brooklyn;
P. Costarino, Inc., 150 Nassau Street;
P. Cardinale, Inc., 605 Seventh Street Hoboken;
Darmstadt, Scott & Courtney, 178 South Street;
A. De Angelis & Company, 12 Park Avenue, Brooklyn;
Michael Flynn, 61 Congress Street, Brooklyn;
R. Goldstein & Son, 200 Fifth Avenue;
Gatti, McQuade Company, 200 Fifth Avenue;
Gotham Paper Stock Company, 31 Ferry Street;
Wm. Hughes & Company, 84 Metropolitan Ave., Brooklyn;
Daniel M. Hicks, Inc., 140 Nassau Street;
Main Paper Stock Company, Inc., 31 Peck Slip;
George W. Millar & Company, 692 Broadway;
Michael McGuire, 100 Tenth Avenue;
Maurice O'Meara Company, 448 Pearl Street;
Onondaga Trading Company, 1142 Broadway;
Thomas Smith & Son, Inc., 75 Pike Slip;
3 A. Salomon, Inc., 15 Park Row;
M. Stramello, 281 Front Street;
Troiana & De Fina, 442 Pearl Street;
E. B. Thomas Company, 100 Hudson Street; and
Wilkinson Brothers Company, 419 Broome Street,
all of the State, county and City of New York, coordinating their efforts under the name "Waste Merchants Association of New York," a voluntary trade association.

III.

(a) That the respondent, the Interstate Commerce Commission, is a body organized under and by virtue of an act entitled "An act to regulate commerce," approved February 4, 1887 (24 Stat. L. 379), and acts amendatory thereof and supplementary there to (25 Stat. L. 855; 26 Stat. L. 743; 28 Stat. L. 643; 34 Stat. L. 584; 34 Stat. L. 838; 35 Stat. L. 60; 35 Stat. L. 648; 36 Stat. L. 539; 37 Stat. L. 566; 37 Stat. L. 701; 38 Stat. L. 1196; 39 Stat. L. 441; 39 Stat. L. 538; 39 Stat. L. 619; 39 Stat. L. 922; 39 Stat. L. 951; 40 Stat. L.

101; 40 Stat. L. 270; 40 Stat. L. 272; 41 Stat. L. 456). That said respondent is an administrative, quasi-judicial tribunal which by said act has heretofore been invested with certain powers, duties and authority in respect to the rates, regulations and practices of common carriers subject to said act to regulate commerce, and payment of allowances and awards of damages to complainants for violation by carriers of provisions of said act as provided in sections 13, 15, 15-A, 16, and others.

(b) That among other duties imposed upon the respondent herein, as provided in said act, is that "The Commission is hereby authorized and required to enforce the provisions of this act."

Among other things therein, section 15 provides:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this act for the transportation of persons or property or for the transmission of messages as defined in the first section of this act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or in the case of a through route where one of the carriers is a water
4 line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

And said section 15 further provides:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable and the Commission may, after hearing on a complaint or on its own initia-

tive, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

And sub-section "A" of said section 15 further provides:

"When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto."

That among other provisions of said act there is one provision in section 16 thereof as follows:

"That if, after hearing a complaint made as provided in section thirteen of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act, for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

IV.

(a) That heretofore, to wit, on March 11, 1919, petitioners, being among the parties entitled so to do pursuant to section 15 of the act to regulate commerce, filed a petition, a copy of which is attached hereto and marked Exhibit "A," and made a part hereof, in the office of the respondent, against:

Walker D. Hines, Director General of Railroads.
Ann Arbor Railroad Company,
Ashland Coal & Iron Railway Company,
The Atchison, Topeka & Santa Fe Railway Company,
Ahnapee & Western Railway Company,
The Akron, Canton & Youngstown Railway Company,
The Buffalo Creek Railroad Company,
Baltimore & Ohio Chicago Terminal Railroad Company,
The Baltimore & Ohio Railroad Company,
The Baltimore & Ohio Southwestern Railroad Company,
The Belt Railway Company of Chicago,
Bessemer & Lake Erie Railroad Company,
Boston & Albany Railroad Company,
The New York Central Railroad Company, Lessee,
Bayone City, Gayland & Alpena Railroad Company,
Buffalo, Rochester & Pittsburgh Railway Company,
Bush Terminal Railroad Company,
Boston & Maine Railroad and J. H. Hustis, Temporary Receiver,
Buffalo & Susquehanna Railroad Corporation,
Central Indiana Railway Company,
The Central Railroad Company of New Jersey,
The Chesapeake & Ohio Railway Company,
The Chesapeake & Ohio Railway Company of Indiana,

The Chicago & Alton Railroad Company,
Chicago & Eastern Illinois Railroad Company,
Chicago & Erie Railroad Company,
The Chicago & Illinois, Midland Railway Company,
Chicago & North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago, Great Western Railroad Company,
Chicago, Indianapolis & Louisville Railway Company,
Chicago, Kalamazoo & Saginaw Railway Company,
Chicago, Milwaukee & Gary Railway Company,
Chicago, Milwaukee & St. Paul Railway Company,
Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and Wm. Cotter, Receivers,
The Chicago, Racine & Milwaukee Line,
The Chicago, Rock Island & Pacific Railway Company,
Chicago, St. Paul, Minneapolis & Omaha Railway Company,
Chicago, Terre Haute & Southeastern Railway Company,
The Cincinnati, Indianapolis & Western Railroad Company,
The Cincinnati, Lebanon & Northern Railway Company,
The Cincinnati, New Orleans & Texas Pacific Railway Company,
The Cincinnati Northern Railroad Company,
The Cleveland, Cincinnati, Chicago & St. Louis Railway Company,
Clinton, Davenport & Muscatine Railway Company,
Canadian Northern Railway Company,
Chatham, Wallaceburg & Lake Erie Railway Company,
Cincinnati, Georgetown & Portsmouth Railroad,
Cooperstown & Charlotte Valley Railroad Company,
Copper Range Railroad Company,
The Cumberland Valley Railroad Company,
Canadian Pacific Railway Company,
Chicago & Illinois Western Railroad,
Central New England Railway Company,
Central Vermont Railway Company,
The Dayton & Union Railroad Company,
The Detroit & Huron Railway Company,
6 Detroit & Mackinac Railway Company,
Detroit & Toledo Shore Line Railroad Company,
Detroit, Bay City & Western Railroad Company,
Detroit, Toledo, and Ironton Railroad Company,
The Duluth, South Shore & Atlantic Railway Company,
The Dayton, Toledo & Chicago Railway Company,
The Delaware & Hudson Company,
Detroit & Cleveland Navigation Company,
Duluth, Missabe & Northern Railway Company,
The Delaware, Lackawanna & Western Railroad Company,
The East St. Louis Connecting Railway Company,
Elgin, Joliet & Eastern Railway Company,
Erie & Michigan Railway & Navigation Company,
Erie Railroad Company,

Evansville & Indianapolis Railroad and W. P. Kappes, Receiver,
The East Jordan & Southern Railroad Company,
Escanaba & Lake Superior Railroad Company,
Essex Terminal Railway,
Fort Wayne, Cincinnati & Louisville Railroad Company,
Frankfort & Cincinnati Railway Company,
Felicity & Bethel Railroad Company,
Fonda, Johnstown & Gloversville Railroad Company,
Grand Rapids & Indiana Railway Company,
Grand Trunk Railway Company of Canada,
The Great Northern Railway Company,
Green Bay & Western Railroad Company,
Goodrich Transit Company,
Grand Trunk Western Railway Company,
The Hanover Railway Company,
The Hocking Valley Railway Company,
Illinois Central Railroad Company,
The Illinois Southern Railway Company and Wm. W. Wheelock, Receiver,
Illinois Terminal Railroad Company,
Indiana Harbor Belt Railroad Company,
Kalamazoo, Lake Shore & Chicago Railway Company,
The Kanawha & Michigan Railway Company,
Kanawha & West Virginia Railroad Company,
Kewaunee, Green Bay & Western Railroad Company,
Kootenai Valley Railway Company,
Lehigh Valley Railroad Company,
The Lake Erie & Western Railroad Company,
Lake Erie, Franklin & Clarion Railroad Company,
Litchfield & Madison Railway Company,
Little Kanawha Railroad Company,
The Lorain, Ashland & Southern Railroad Company,
The Lorain & West Virginia Railway Company,
Louisville & Nashville Railroad Company,
Louisville, Henderson & St. Louis Railway Company,
Louisville, New Albany & Corydon Railroad Company,
Lake Superior & Ispeming Railway Company,
7 Laona & Northern Railway Company,
London & Lake Erie Railway & Transportation Company,
The Long Island Railroad Company,
London & Port Stanley Railway,
The Lehigh & Hudson River Railway Company,
Lehigh & New England Railroad Company,
Manistee & North-Eastern Railroad Company,
The Michigan Central Railroad Company,
Michigan East & West Railway Company and E. Ford, Receiver,
Michigan Railway Company,
The Minneapolis & St. Louis Railroad Company,
Minneapolis, St. Paul & Saulte Ste. Marie Railway Company,

The Monongahela Railway Company,
Montour Railroad Company,
Muscantine, Burlington & Southern Railroad Company,
Missouri Pacific Railroad Corporation in Illinois,
Munising, Marquette & Southeastern Railway,
Manistique & Lake Superior Railroad Company,
Marinette, Tonahawk & Western Railroad Company,
Missouri Pacific Railroad Company,
Maine Central Railroad Company,
Nashville, Chattanooga & St. Louis Railway,
New Jersey, Indiana & Illinois Railroad Company,
The New York Central Railroad Company,
The New York, Chicago & St. Louis Railroad Company,
Norfolk & Western Railway Company,
The Northern Ohio Railway Company,
Northern Pacific Railway Company,
New York, Philadelphia & Norfolk Railroad Company,
New York, Susquehanna & Western Railroad Company,
New York, Ontario & Western Railway Company,
The New York, New Haven & Hartford Railroad Company,
New Jersey & New York Railroad Company,
New York & Greenwood Lake Railway Company,
Oregon Shore Line Railroad Company,
The Pittsburgh, Shawmut & Northern Railroad Company, and F. S. Smith, Receiver,
Pennsylvania Terminal Railway Company,
The Pennsylvania Railroad Company,
The Pennsylvania Railroad Company, Western Lines,
Peoria & Pekin Union Railway Company,
Peoria Railway Terminal Company,
Pere Marquette Railway Company,
Philadelphia & Reading Railway Company,
The Pittsburgh & Lake Erie Railroad Company,
The Pittsburgh & West Virginia Railway Company,
Pittsburgh, Chartiers & Youghiogheny Railway Company,
The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company,
Pontiac, Oxford & Northern Railroad Company,
Pere Marquette Line Steamers,
8 The Pittsburgh, Lisbon & Western Railroad Company,
Quincy, Omaha & Kansas City Railroad Company,
Rock Island Southern Railroad Company,
Rutland Railroad Company,
Richmond, Fredericksburg & Potomac Railroad Company,
Rome, Watertown & Ogdensburg Railroad Company,
St. Joseph Valley Railway Company and Herbert E. Bucklen, Receiver,
St. Louis Southwestern Railway Company,
The Sharpsville Railroad Company and G. M. McIlvain, Receiver,

Sidell & Olney Railroad Company,
Southern Railway Company,
The St. Joseph & Grand Island Railway Company,
St. Louis & Hannibal Railroad Company,
Stewartstown Railroad Company,
Seaboard Air Line Railway Company,
The Toledo & Ohio Central Railway Company,
Toledo, Peoria & Western Railway Company and E. N. Armstrong, Receiver,
Toledo, St. Louis & Western Railroad Company and W. L. Ross, Receiver,
The Toronto, Hamilton & Buffalo Railway Company,
The Tuckerton Railroad Company,
Wabash Railway Company,
The Wabash, Chestern & Western Railroad Company and J. Fred Gilster, Receiver,
Western Allegheny Railroad Company,
The Wheeling & Lake Erie Railway Company,
Washington Southern Railway Company,
Wisconsin & Northern Railroad Company,
West Shore Railroad Company (The New York Central Railroad Company, Lessee),
The Youngstown & Ohio River Railroad Company,
The Zanesville & Western Railway Company,

as defendants, said defendants being common carriers between points in New York and points in other states and as such common carriers each was and is subject to the provisions of the said act to regulate commerce, and the Federal control act.

That said proceeding is Number 10509 on the docket of the respondent.

(b) The said defendants thereafter filed in the office of respondent answers substantially denying the allegations of the said petition.

(c) That in due course and in accordance with law and respondent's Rules of Practice, a full and complete hearing upon the matters and things involved was held before one of respondent's examiners in the State, county and City of New York, on or about May 13th, 14th and 16th, 1919. At said hearing, paragraphs #11, 12, and 13 of the petition or complaint were stricken out, by agreement of counsel.

9 (d) That thereafter and in accordance with respondent's Rules of Practice, briefs were filed in the office of respondent by counsel in behalf of your petitioners and said defendants.

(e) That in accordance with respondent's Rules of Practice, the prayer for relief as contained in the original petition was restated in your petitioners' brief as follows:

"Complainants pray:

1. That the Commission disregard the nominal allowance of 12 cents per ton and prescribe a reasonable allowance for a basis of reparation and for the future.

2. That an award of damages be made in any amount which may be found due to the shippers for the violations herein complained of.

3. That the carriers be compelled to issue a clear receipt or bill of lading, when the shipment is received by them at public stations where employees are maintained for the receipt of freight.

4. That the carriers be compelled to perform the loading service in the future as provided for by the tariffs."

(f) That thereafter, and in accordance with respondent's Rules of Practice, the examiner who conducted the hearing referred to herein, prepared and submitted to respondent and to counsel a proposed report, under the conclusions of which said report your petitioners were adjudged to be entitled to receive as reparation from defendants an amount to be determined on the basis of twelve cents (12¢) per ton and a minimum of two dollars ($2.00) per car for all the freight loaded by your petitioners as alleged in the said original petition or complaint; and under said Rules of Practice the said proposed report would, in the absence of good reasons to the contrary, have become in due course the final report and been filed as the report of the respondent.

(g) That in accordance with respondent's Rules of Practice, exceptions to the said proposed report were filed in behalf of all parties, and oral argument in behalf of all parties was heard by respondent.

(h) That thereafter, to wit, on June 1st, 1920, respondent in the manner and form required by law, made, entered and filed a report in said proceeding, a certified copy of which report it attached hereto and marked Exhibit "B," and made a part hereof. Said report sets forth as conclusions of fact that your petitioners did perform the loading of the freight involved to the defendants' cars, and that defendants did issue to your petitioners qualified receipts, to wit, "Shippers load and count bills of lading" for the said freight when tendered at defendants' stations for shipment; but notwithstanding the above stated conclusions of fact, respondent has ignored entirely certain portions of the testimony and exhibits thereto and has given an erroneous legal effect to certain facts and circumstances, all of record; and further, respondent dismissed your petitioners' petition or complaint upon an erroneous conclusion of law that "Nothing in the act requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience," and after referring to section 15 of the act to regulate commerce states a further erroneous conclusion of law, to wit, "This provision is intended merely to provide against excessive allowances."

(i) That your petitioners, upon being advised that the report made, entered and filed by respondent in the said proceeding expressed conclusions of law and conclusions of fact which were and are erroneous, and which give to the facts and circumstances of record therein an erroneous legal effect, in accordance with law and said Rules and Practice your petitioners caused to be filed in their behalf

a petition for rehearing in said proceeding, a copy of which is attached hereto and marked Exhibit "C" and made a part hereof, and your petitioners did therein present to respondent a schedule of the many errors of fact and of law as expressed in the said report, and your petitioners respectfully refer your honor to Exhibit "C" hereto attached; that respondent denied said petition for rehearing on August 7, 1920.

V.

Your petitioners respectfully refer your honor to the Exhibits "A," "B," and "C" attached hereto, from which it will appear that the railroads serving New York City do now and have for many years past, by special tariff exceptions duly filed and published, assume the labor of loading and unloading all freight in carloads, either received or delivered at, through or over their respective stations, piers, sheds, platforms or warehouses as named in said tariffs; that said labor of loading and unloading of cars was and still is a part of the through transportation and all freight rates in connection therewith are fixed and published to include said labor; that delivery or tender of freight to said railroads, for transportation, is complete when said freight is offered by the shipper at said stations, piers, sheds, platforms or warehouses; that the duty of said railroads is to accept said freight promptly and in return therefor give to the shipper a clear receipt or "Bill of lading" without any reservations or limitations other than those prescribed by the Interstate Commerce Commission; that your petitioners, during the months of January and February, 1917, were advised that the various railroads serving New York City had all adopted a practice of refusing to perform the labor of loading into cars at their respective stations, piers, sheds, platforms or warehouses shipments of paper stock in carloads, and also that limited receipts or "Shippers load and count bills of lading" were being issued by said carriers for the said shipments, all in violation of the tariffs duly filed and published according to law and in violation of the act to regulate commerce, the bills of lading act, and the Federal control act; that your petitioners protested to said carriers in writing and verbally against the said illegal practices, all of which is of record in the proceedings hereinbefore described; but the said carriers did refuse, and continue to refuse, to receive and load said shipments of paper stock to cars; and said carriers did refuse, and continue to refuse, to compensate your petitioners for performing said labor of loading; and said carriers did refuse, and continue to refuse, to issue to your petitioners clear
11 receipts or "Bills of lading" for the said shipments; that your petitioners were and are now compelled to ship and conduct their businesses under the said illegal practices; that respondent has arbitrarily ignored the illegal practices which continue to exist, and respondent has arbitrarily and without warrant ignored certain matters of evidence which appear of record in said proceeding.

VI.

Your petitioners are advised that they are as a matter of law entitled to receive compensation from carriers defendants in said proceeding, for the labor of loading said shipments at the places named in defendants' tariffs, and that as a matter of law said defendants are bound to issue a clear receipt or "bill of lading" for said shipments when tendered for transportation at any public station where employees are maintained by the said carrier or carriers for the receipt or delivery of freight.

VII.

Your petitioners are advised that the said respondent has exclusive jurisdiction in respect to numerous provisions of the said act to regulate commerce, and particularly with respect to the prescribing of allowances to shippers and the award of damages for a violation of said act; and that respondent is charged with the duty of executing and enforcing each and every provision of said act; that when specifically charged with such duty said respondent can exercise no discretion in respect thereto.

VIII.

That your petitioners have no appeal or review by way of appeal or otherwise from the decision of the respondent in said case No. 10509; that said act to regulate commerce provides no remedy by which an order refusing to take jurisdiction of or grant affirmative relief in a complaint or petition before the respondent can be reviewed or reconsidered otherwise than by rehearing, and petitioners, having applied for a rehearing and said rehearing having been denied, are without remedy to proceed in respect to the matters and things alleged in said original petition save only and excepting by application to this honorable court for mandamus to compel respondent to comply with the duties and obligations imposed upon it by the said act to regulate commerce.

Wherefore, the premises considered, petitioners pray:

1. That your honor grant a rule directed to the respondent to show cause by a time limited in said rule why the said respondent should not take jurisdiction of and grant affirmative relief in the matters and things alleged in the complaint of the petitioners, being No. 1059 on the docket of said respondent, and why it should not take jurisdiction of and act affirmatively on the claim of petitioners for an award of damages on account of services performed in the transportation of the said shipments, and a sum as actual damages sustained by your petitioners on account of the illegal practices aforementioned, set up in petitioners' complaint before respondent, said shipments moving from New York City to

various destinations in the State of New York and other States, between March 11, 1917, to the present time, as required by the act to regulate commerce.

2. That this honorable court direct the respondent to certify to this honorable court the records and proceedings in said proceeding, that this court may hear and determine whether or not said respondent has jurisdiction of, and whether or not respondent should grant affirmative relief in, the matters and things in said petition set forth.

3. That this court issue to respondent the peremptory writ of mandamus requiring and commanding the said respondent to take jurisdiction of, and grant affirmative relief, to wit, the fixing of the amount of damages in, the matters and things set forth in said petition.

4. That this court issue the peremptory writ of mandamus directed to the respondent commanding and directing it to execute and enforce the said act, and particularly in respect to requiring respondent in case No. 10509 to take jurisdiction as required by the act to regulate commerce of petitioners' claim for damages on account of illegal charges and practices in transporting petitioners' shipments moving between March 11, 1917, and the present time, all of said shipments having been loaded by your petitioners without compensation therefor, and limited receipts or "Shippers' load and count bills of lading" having been issued to your petitioners for said shipments when tendered to said defendants.

5. And for such other and further relief as your honor may deem petitioners are entitled to in the premises.

WASTE MERCHANTS ASSOCIATION OF NEW YORK,
By ITS MEMBERS.
ERNIE ADAMSON,
Attorney in Fact and Law.

ERNIE ADAMSON AND
BELL, MARSHALL & RICE,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

I, Ernie Adamson certify that I am the attorney in fact for the above described petitioners in the above petition for mandamus; that I have read the foregoing petition by me subscribed, and know the facts as contained therein to be true and correct, except as to the things stated to be on information and belief, which I believe to be true.

ERNIE ADAMSON.

13 Subscribed and sworn to before me this 4th day of October, 1920.

[SEAL.]

EMMA R. BELL,
Notary Public, D. C.

EXHIBIT "A."

Filed October 4, 1920.

Before the Interstate Commerce Commission.

Docket No. 10509.

THE WASTE MERCHANTS ASSOCIATION OF NEW YORK, Complainant,

vs.

WALKER D. HINES, Director General of Railroads,

Ann Arbor Railroad Company,
Ashland Coal & Iron Railway Company,
The Atchison, Topeka & Santa Fe Railway Company,
Ahnapee & Western Railway Company,
The Akron, Canton & Youngstown Railway Company,
The Buffalo Creek Railroad Company,
Baltimore & Ohio Chicago Terminal Railroad Company,
The Baltimore & Ohio Railroad Company,
The Baltimore & Ohio Southwestern Railroad Company,
The Belt Railway Company of Chicago,
Bessemer & Lake Erie Railroad Company,
Boston & Albany Railroad Company,
The New York Central Railroad Company, Lessee,
Bayone City, Gayland & Alpena Railroad Company,
Buffalo, Rochester & Pittsburg Railway Company,
Bush Terminal Railroad Company,
Boston & Maine Railroad and J. H. Hustis, Temporary Receiver,
Buffalo & Susquehanna Railroad Corporation,
Central Indiana Railway Company,
The Central Railroad Company of New Jersey,
The Chesapeake & Ohio Railway Company,
The Chesapeake & Ohio Railway Company of Indiana,
The Chicago & Alton Railroad Company,
Chicago & Eastern Illinois Railroad Company,
Chicago & Erie Railroad Company,
The Chicago & Illinois Midland Railway Company,
Chicago & North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railroad Company,
Chicago, Indianapolis & Louisville Railway Company,
Chicago, Kalamazoo & Saginaw Railway Company,
Chicago, Milwaukee & Gary Railway Company,
Chicago, Milwaukee & St. Paul Railway Company,
Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and Wm. Cotter, Receivers,

14 The Chicago, Racine & Milwaukee Line,
The Chicago, Rock Island & Pacific Railway Company,
Chicago, St. Paul, Minneapolis & Omaha Railway Company,
Chicago, Terre Haute & Southeastern Railway Company,
The Cincinnati, Indianapolis & Western Railroad Company,
The Cincinnati, Lebanon & Northern Railway Company,
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Elgin, Joliet & Eastern Railway Company,
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Erie Railroad Company,
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Felicity & Bethel Railroad Company,
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Grand Rapids & Indiana Railway Company,
Grand Trunk Railway Company of Canada,
The Great Northern Railway Company,
Green Bay & Western Railroad Company,
Goodrich Transit Company,

Grand Trunk Western Railway Company,
The Hanover Railway Company,
15 The Hocking Valley Railway Company,
Illinois Central Railroad Company,
The Illinois Southern Railway Company and Wm. W. Wheelock, Receiver,
Illinois Terminal Railroad Company,
Indiana Harbor Belt Railroad Company,
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The Kanawha & Michigan Railway Company,
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The Lake Erie & Western Railroad Company,
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Louisville, Henderson & St. Louis Railway Company,
Louisville, New Albany & Corydon Railroad Company,
Lake Superior & Ispeming Railway Company,
Laona & Northern Railway Company,
London & Lake Erie Railway & Transportation Company,
The Long Island Railroad Company,
London & Port Stanley Railway,
The Lehigh & Hudson River Railway Company,
Lehigh & New England Railroad Company,
Manistee & North-Eastern Railroad Company,
The Michigan Central Railroad Company,
Michigan East & West Railway Company and E. Ford, Receiver,
Michigan Railway Company,
The Minneapolis & St. Louis Railroad Company,
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,
The Monongahela Railway Company,
Montour Railroad Company,
Muscatine, Burlington & Southern Railroad Company,
Missouri Pacific Railroad Corporation in Illinois,
Munising, Marquette & Southeastern Railway,
Manistique & Lake Superior Railroad Company,
Marinette, Tonahawk & Western Railroad Company,
Missouri Pacific Railroad Company,
Maine Central Railroad Company,
Nashville, Chattanooga & St. Louis Railway,
New Jersey, Indiana & Illinois Railroad Company,
The New York Central Railroad Company,

The New York, Chicago & St. Louis Railroad Company,
Norfolk & Western Railway Company,
The Northern Ohio Railway Company,
Northern Pacific Railway Company,
16 New York, Philadelphia & Norfolk Railroad Company,
New York, Susquehanna & Western Railroad Company,
New York, Ontario & Western Railway Company,
The New York, New Haven & Hartford Railroad Company,
New Jersey & New York Railroad Company,
New York & Greenwood Lake Railway Company,
Oregon Shore Line Railroad Company,
The Pittsburgh, Shawmut & Northern Railroad Company, and F. S. Smith, Receiver,
Pennsylvania Terminal Railway Company,
The Pennsylvania Railroad Company,
The Pennsylvania Railroad Company, Western Lines,
Peoria & Pekin Union Railway Company,
Peoria Railway Terminal Company,
Pere Marquette Railway Company,
Philadelphia & Reading Railway Company,
The Pittsburgh & Lake Erie Railroad Company,
The Pittsburgh & West Virginia Railway Company,
Pittsburgh, Chartiers & Youghiogheny Railway Company,
The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company,
Pontiac, Oxford & Northern Railroad Company,
Pere Marquette Line Steamers,
The Pittsburgh, Lisbon & Western Railroad Company,
Quincy, Omaha & Kansas City Railroad Company,
Rock Island Southern Railroad Company,
Rutland Railroad Company,
Richmond, Fredericksburg & Potomac Railroad Company,
Rome, Watertown & Ogdensburg Railroad Company,
St. Joseph Valley Railway Company and Herbert E. Bucklen, Receiver,
St. Louis Southwestern Railway Company,
The Sharpsville Railroad Company and G. M. McIlvain, Receiver,
Sidell & Olney Railroad Company,
Southern Railway Company,
The St. Joseph & Grand Island Railway Company,
St. Louis & Hannibal Railroad Company,
Stewartstown Railroad Company,
Seaboard Air Line Railway Company,
The Toledo & Ohio Central Railway Company,
Toledo, Peoria & Western Railway Company and E. N. Armstrong, Receiver,
Toledo, St. Louis & Western Railroad Company and W. L. Ross, Receiver,
The Toronto, Hamilton & Buffalo Railway Company,
The Tuckerton Railroad Company,

Wabash Railway Company,
The Wabash, Chestern & Western Railroad Company and J. Fred Gilster, Receiver.
Western Allegheny Railroad Company,
The Wheeling & Lake Erie Railway Company,
Washington Southern Railway Company,
17 Wisconsin & Northern Railroad Company,
West Shore Railroad Company (The New York Central Railroad Company, Lessee),
The Youngstown & Ohio River Railroad Company,
The Zanesville & Western Railway Company.

To the Honorable Interstate Commerce Commission:

The complaint of the above named complainant respectfully shows:

I.

That The Waste Merchants Association of New York is an unincorporated association, with its principal offices at 277 Water Street in the City of New York, composed of the following individuals, partnerships and corporations:

Atterbury Brothers, Inc., 145 Nassau Street.
Atterbury & McKelvey, Inc., 145 Nassau Street.
American Wood Pulp Corporation, 347 Madison Avenue.
Ira L. Beebe & Company, 132 Nassau Street.
Nat. E. Berzen, 309 Water Street.
E. Butterworth & Company, 132 Nassau Street.
Box Board & Lining Company, 10 Grand Street.
Castle, Gottheil & Overton, 200 Fifth Avenue.
Chase & Norton, Inc., 277 Water Street.
V. G. Cantasano & Brother, 185 South Street.
George Carrizzo & Company, 424 Third Avenue, Brooklyn.
P. Costarino, Inc., 150 Nassau Street.
P. Cardinale, Inc., 605 Seventh Street, Hoboken.
Darmstadt, Scott & Courtney, 178 South Street.
A. DeAngelis & Company, 12 Park Avenue, Brooklyn.
Michael Flynn, 61 Congress Street, Brooklyn.
R. Goldstein & Son, 200 Fifth Avenue.
Gatti, McQuade Company, 200 Fifth Avenue.
Gotham Paper Stock Company, 31 Ferry Street.
Wm. Hughes & Company, 84 Metropolitan Avenue, Brooklyn.
Daniel M. Hicks, Inc., 140 Nassau Street.
Main Paper Stock Company, Inc., 31 Peck Slip.
George W. Millar & Company, 692 Broadway.
Michael McGuire, 100 Tenth Avenue.
Maurice O'Meara Company, 448 Pearl Street.
Onondaga Trading Company, 1142 Broadway.
Thomas Smith & Son, Inc., 75 Pike Slip.
A. Salomon, Inc., 15 Park Row.

M. Stramello, 281 Front Street.
Troiano & De Fina, 442 Pearl Street.
E. B. Thomas Company, 100 Hudson Street.
Wilkinson Brothers Company, 419 Broome Street.
All doing business in the City of New York as waste material merchants, and as such dealers ship, in due course of business,
18 paper and rags, known as paper stock, compressed into bales, in carloads, from the City of New York to points outside the State of New York.

II.

That the said defendant Walker D. Hines, Director General of Railroads, is an officer acting for the United States of America and the President thereof, and is exercising authority delegated to him by the President in the possession, use, control, and operation of certain railroads and systems of transportation, taken over by the President under powers conferred upon him, over which lines so taken over the rates, regulations and practices complained of herein apply and which lines were formerly operated by certain of the above named corporations or companies now under said Federal control for and on their own behalf.

That said carriers above named and the said Walter D. Hines, Director General of Railroads, each and all of them, are common carriers and, by themselves, or with their connections, or by himself, transport property for hire, either wholly by railroad or partly by railroad and partly by water, between points in the said State of New York and other States, and as such common carriers are subject to the provisions of the act to regulate commerce, approved February 4, 1887, and all other acts amendatory thereof or supplementary thereto, and the Federal control act.

III.

That the defendants above named publish in Official Classification No. 44, Rule 8–B:

"Owners are required to load and unload all freight carried at carload ratings."

IV.

That the Pennsylvania Railroad's exceptions to Official Classification No. 44, I. C. C. 7230, effective May 15, 1916, provide in part as follows:

"Exceptions to Rule 8–B.

"At New York, N. Y., and Brooklyn, N. Y., freight in carloads other than bulky freight carried at carload rates, received or delivered at New York or Brooklyn stations, as shown in the list of stations and agencies (Note 9), and carrier's warehouses or sheds, or over piers or platforms, will be loaded into and unloaded from cars by the carriers."

This provision is still carried in P. R. R., I. C. C. 8325, effective March 10, 1918.

19

V.

That the next above quoted exception to Rule 8–B is also carried in tariffs of all terminal carriers serving New York City, to wit:

Erie—I. C. C. No. 8827	effective	Apr. 1, 1911 now carried in
—I. C. C. No. 14943	"	Nov. 4, 1918
C. of N. J.—I. C. C. No. 9005	"	Jul. 10, 1916
N. Y. N. H. & H.—I. C. C. No. 1811	"	May 15, 1916
B. & O.—I. C. C. No. 14590	"	Aug. 5, 1916 now carried in
—I. C. C. No. 15273	"	Feb. 9, 1918
D. L. & W.—I. C. C. No. 7535	"	May 1, 1911 now carried in
—I. C. C. No. 15255	"	Jun. 25, 1918
L. V.—I. C. C. No. B–6900	"	Dec. 1, 1911 now carried in
—I. C. C. No. C–4810	"	Apr. 3, 1918

VI.

That a slight variation of the next above quoted exception to Rule 8–B Official Classification, to wit:

N. Y. C.—I. C. C. 5275, effective May 16, 1916; Supplement 55 to N. Y. C. tariff A–29130, effective May 25, 1916.

West Shore—I. C. C. 1750, effective May 25, 1916; supplement 57 to West Shore tariff A–10,000, as follows:

"Exceptions to Rule 8–B of Official Classification—loading and unloading carload freight.

"Freight in carloads, other than bulk freight, carried at carload rates, received or delivered at the following stations; through carrier's warehouses or sheds or over carrier's platform, will be loaded into or unloaded from car by carriers."

VII.

That complainant's members have tendered to defendants above named, at their various designated stations in New York City, shipments of paper stock in bales, in carloads, for interstate transportation, subject to the rates, rules and regulations published in the beforementioned tariffs.

VIII.

The complainant's members have been compelled, on account of the failure and refusal of defendants, to perform the service of loading the shipments of paper stock into the cars, at an expense borne entirely by said members, who were the shippers. And further, that defendants have failed and refused to perform such loading service for a period of more than two years prior to the filing of this complaint, and they still fail and refuse to perform said service.

20

IX.

That although tenders of shipments are made at defendants' duly established and designated stations, warehouses, sheds, piers and

platforms, complainant's members are compelled to perform the service of loading cars and accept a bill of lading or receipt for the respective shipments, across the face of which is stamped or printed the words "Shippers load and count," in an effort to limit the carrier's liability for loss of or damage to goods in transit.

X.

The complainant's members have protested and made demand upon defendants to furnish an agent to check and verify shipments upon delivery at the duly established and designated stations, warehouses, sheds, piers and platforms, but said defendants have refused, and continue to refuse to inspect, check and verify said shipments upon delivery to said stations for transportation, and issue to complainant's members clear bills of lading or receipts, in full, for said shipments.

XI.

That complainant's members have for many years prior to the date of about January 1, 1917, enjoyed and made use of the service known as "free lighterage" on paper stock in bales, in carloads, within the lighterage limits of New York Harbor, as described and defined in the various terminal tariffs of the terminal carriers at the City of New York, and named as defendants herein, said tariffs being as follows:

N. Y. C., I. C. C. 4352.
W. S., I. C. C. 1529.
N. Y., N. H. & H., I. C. C. F-1155.
D. L. & W., I. C. C. 13050.
Erie, I. C. C. 13856.
L. V., I. C. C. C-6400.
P. R. R., I. C. C. GO-8300.
C. R. R. of N. J., I. C. C. S-9170.
B. & O., I. C. C. 14826.

XII.

That the defendants, for a period of approximately two years prior to the date of the filing of this complaint, have failed and refused to furnish and perform the said "free lighterage" service within the duly established lighterage limits of New York Harbor, and to and from the various piers and warehouses therein.

21

XIII.

That in almost every instance complainant's members are compelled to perform burdensome and expensive drayage and hauling services on account of the failure and refusal of the carriers to furnish and perform the "free lighterage" service as provided for in their respective tariffs.

XIV.

That complainant's members have made numerous carload shipments of paper stock via defendants' lines, all of which shipments were delivered at the duly established and designated stations, sheds, warehouses and piers of the said defendants, and which shipments were loaded into the cars by and at the expense of the shippers, or said shipments were lightered from piers or wharves other than those maintained by the said defendants, lighterage service being performed entirely by and at the expense of the shippers, and no allowance or allowances or reduction from the published rates being made to the shippers for the performance of the loading or lighterage services, both of which services were and are contemplated as a part of the through transportation and compensated for by the through published rates.

XV.

That by reason of the facts stated in the foregoing paragraphs, complainant's members have been subjected to the payment of rates and charges for transportation which, when exacted, and still are unjust and unreasonable and in violation of section 1 of the act to regulate commerce, and unjustly discriminatory and in violation of section 2, and unjustly preferential and prejudicial and in violation of section 3, and in violation of section 10 of the Federal control act.

XVI.

That complainant's members have suffered great financial damage and injury, and have been subjected to great inconvenience and extreme hardship in the course of their business, on account of the violation by defendants of their duly published tariffs and rules and regulations, and an award of reparation is due said members as liquidated damages, under sections 8 and 9 of the act to regulate commerce.

XVII.

That whereas many shipments have been made upon and under the unjust and unreasonable rates, regulations and practices herein complained of, upon which the respective shippers paid and bore the unreasonable charges assessed, a complete statement of such shipments will be filed on rendition of the decision of the honorable Commission.

22 Wherefore, complainant prays that the defendants be severally required to answer the charges herein, and that after due hearing and investigation, an order be made commanding the said defendants, and each of them, to cease and desist from the aforesaid violations of said act to regulate commerce and said Federal control act and to in the future observe and comply with the provisions of the tariffs lawfully on file, and such other rules, regulations

and practices as the Commission may deem proper to prescribe; and also (a) to pay to complainant's members by way of reparation a reasonable allowance per ton or per car for the loading services performed by them, and which are presumed to be performed by defendants; (b) to pay to complainant's members by way of reparation a reasonable allowance per ton or per car for lighterage services performed, and which are presumed to be performed by defendants, and (c) to pay to complainant's members a sum, the amount of which to be determined, as liquidated damages for violation of said act to regulate commerce and said Federal control act, or such other sum or sums as, in view of the evidence to be adduced herein, the Commission shall determine that complainant's members are entitled to as an award of damages under the provisions of said act or acts and the violations thereof, and that such other and further order or orders be issued as the Commission may consider proper in the premises.

ALMY, VAN GORDON & EVANS,
Attorneys for Complainant.

46 Cedar Street, New York.

ERNIE ADAMSON,
Of Counsel.

This — day of ——, 1919.

EXHIBIT "B."

Filed October 14, 1920.

Interstate Commerce Commission.

No. 10509.

WASTE MERCHANTS ASSOCIATION OF NEW YORK

v.

DIRECTOR GENERAL, ANN ARBOR RAILROAD COMPANY ET AL.

Submitted February 26, 1920; Decided June 1, 1920.

On complaint that carriers serving tariff-named piers and stations in New York and Brooklyn, N. Y., failed to render the service of loading carload shipments of waste paper stock provided for under the rates in their tariffs, thereby compelling complainant's members to furnish such service by means of their own employees; and
23 that in consequence rates were exacted which were in violation of sections 1, 2, and 3, of the act to regulate commerce, and of section 10 of the Federal control act; Held, That the variance of the practice from the tariff undertaking was as much in the interest of complainant's members as of defendants; that the rates collected

were not unreasonable, unjustly discriminatory, or unduly prejudicial for the transportation service rendered. Complaint dismissed.

Ernie Adamson, for complainants.

R. W. Barrett, for respondents.

Report of the Commission.

Division 2, Commissioners Clark, Daniels, and Wooley.

Woolley, Commissioner:

The complainant is an unincorporated association of individuals, partnerships, and corporations engaged in business in New York, N. Y., and the vicinity. Its members deal in waste material and ship paper and rags, known as paper stock, compressed into bales, in carloads, from New York City, N. Y., to points outside the state of New York. The complaint, filed March 11, 1919, alleges that defendants, in connection with the transportation of paper stock in bales, in carloads from New York City to interstate points have refused to render the service of loading such shipments, to furnish agents to check and verify the shipments upon delivery at duly established stations, warehouses, sheds, piers, and platforms, and to furnish free lighterage service within the lighterage limits of New York Harbor; that defendants in connection with the transportation of other kinds of freight furnish such service without charge to shippers; and that by reason of facts alleged complainant's members have been subjected to the payment of rates and charges for transportation which were unreasonable, unjustly discriminatory, and unduly prejudicial in violation of sections 1, 2 and 3 of the act to regulate commerce and of section 10 of the Federal control act. We are asked to prescribe for the future rates, regulations, and practices and to require defendants to observe the provisions of the lawful tariffs.

Reparation is sought in an amount which shall represent "a reasonable allowance per ton or per car for lighterage services performed, and which are presumed to be performed by defendants," and "liquidated damages for violation of said act to regulate commerce and said Federal control act." The allegation as to the disregard of the tariff provisions in respect to lighterage was abandoned.

To the general rule that shippers must load carload freight, the carriers serving New York Harbor points publish exceptions which are substantially the same as the following:

24 Exceptions to Rule 8—B.

(Pennsylvania Railroad Company's Exceptions to Official Classification No. 44, I. C. C., 7230.)

At New York, N. Y., and Brooklyn, N. Y., freight in carloads, other than bulky freight carried at carload rates, received or delivered at New York or Brooklyn stations, as shown in the list of

stations and agencies (Note 9), and carriers's warehouses or sheds or over piers of platforms, will be loaded into and unloaded from cars by the carriers.

The exceptions at New York Harbor have been brought to pass by conditioning circumstances at that port. Outbound freight is loaded from piers or pier stations into cars standing on floats alongside of piers instead of from trucks into cars on team tracks. Shippers at New York are required to bring their freight to carriers' pier stations and there to unload it to the bulkhead, or in instances to take their trucks on to the pier and unload the freight at some point opposite the location of the empty cars standing on floats to receive the freight.

The complainant contends that the defendants refused to perform the obligations assumed by the tariff exceptions cited above, in that they did not load paper stock of complainant's members into cars for the outbound movement during the period covered by the complaint. It is undisputed that the defendants did not load a large part of complainant's members' paper stock into cars during this period, contrary to their tariff undertaking and that the employees of these shippers actually performed the loading service. What were the circumstances which led the carriers to depart from their tariffs and former practice in this respect?

In April, 1917, the United States entered the World War, and one of the results was a congestion of traffic, accompanied by a labor shortage, particularly experienced by the carriers at their terminals in New York. The Central Railroad of New Jersey embargoed the shipment of paper stock. At the New York Central, pier 34, all westbound freight was embargoed, except in carload lots when loaded by the shippers. The Lehigh Valley Railroad and the Lackawanna Railroad embargoed paper stock. Shippers of paper stock along with nearly all other shippers in New York and Brooklyn carried their freight in trucks to railroad piers and pier stations. When these trucks of paper stock took their places in long lines of vehicles containing various commodities waiting for a chance to be unloaded at the piers, great delays ensued and the trucking became exceedingly expensive. These delays were largely due to labor shortage. Either the carriers or the shippers suggested that the movement of paper stock would be facilitated if the shippers were willing to load their paper stock into empty cars for outbound movement. The evidence is somewhat conflicting as to the origin of this suggestion. However, from the evidence as a whole, there is little
25 doubt but that an agreement, tacit or expressed, was arrived at between the carriers and shippers of paper stock by which the latter undertook to do their own loading of the cars if they were permitted to drive their trucks on to the piers of the former with but short periods of waiting. The complainant's members thus were enabled to withdraw their trucks from the long lines of vehicles containing miscellaneous commodities and to form lines consisting exclusively of trucks of paper stock.

That such a mutual arrangement was for the benefit of both parties under the extraordinary conditions of war times can not be questioned. Paper stock is a low-grade commodity which ordinarily moves in large quantities and the record indicates that during the period of congestion these shippers were able to forward between 40,000 and 80,000 carloads of paper stock. This is persuasive that they fared much better than shippers of certain other commodities who were compelled to wait their turn in the slow process of loading by the carriers' reduced force of labor.

By no means all of the outbound pier stations in the vicinity of New York harbor were referred to in the testimony which is indefinite in character and in details conflicting.

Unjust discrimination against complainant's members or undue preference of other commodities has not been satisfactorily established. However, it appears that whereas these shippers were not provided with freight checkers or tallymen by the carriers and therefore were given bills of lading marked "shippers' load and count" shippers of hides and leather who also loaded cars on the floats at the piers were provided with freight checkers and given "clean" bills of lading. On the other hand the carriers would not allow shippers of spelter and other valuable metals even to load. Such shipments the carriers loaded and tallied for their own protection and for them issued "clean" bills of lading. This was discrimination, but it was not unjust; preference, but not undue; and no damage to complainant's members was shown to have arisen by reason of marking the bills of lading of paper stock, "shippers' load and count," other than delays in the settlement of claims.

It is obvious as pointed out above, that the carriers did not fulfill their complete obligation under the tariffs during the prevalence of war conditions, and as a consequence the shippers were compelled to incur the expense of loading by means of their own employees. For the most part, however, had the shippers insisted on their rights under the tariffs, their paper stock would have been received eventually after long delays along with other commodities and loaded by the carriers. Pursuing such a course, they would not have been able to ship nearly as much as they did, and the expense incident to the delays of trucks standing in long lines together with conveyances of other commodities for hours waiting to unload would have far outweighed the expense of loading the cars by their own employees. If deprived of some portion of this transportation service extended by tariff, due to war conditions, these shippers received a consider-
ation for such deprivation, the very undertaking by the car-
26 riers in their tariffs to load carload shipments, as pointed out, is an exception to the general practice in favor of the shippers at New York. There is no evidence to indicate that the rates or the charges paid on complainant's shipments were excessive for the total transportation service actually rendered to them by the carriers, excluding loading.

For any failure to observe their published tariffs the carriers may be answerable in another process. There was no alternate clause in defendants' tariffs providing for the payment of an allowance if the shipper performed the loading service and hence since all allowances to a shipper must be published in the tariffs, even if defendants desired, they could not lawfully have compensated complainant's members for the loading service rendered by them. Nothing in the act requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience. Section 15 says:

If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished.

This provision is intended merely to provide against excessive allowances.

We are of opinion and find that the rates and transportation charges assessed on the shipments of paper stock of complainant's members during the period covered by the complaint were not unreasonable, unjustly discriminatory, or unduly prejudicial in violation of the act to regulate commerce, or unreasonable in violation of section 10 of the Federal control act for the transportation service actually rendered by the carriers; that, under the circumstances, there was no obligation on the part of the carriers to make an allowance to complainant's members for the loading service. The complaint will be dismissed.

Order.

At a session of the Interstate Commerce Commission, Division 2, held at its office, in Washington, D. C., on the 1st day of June, A. D. 1920.

No. 10509.

WASTE MERCHANTS ASSOCIATION OF NEW YORK

v.

DIRECTOR GENERAL, ANN ARBOR RAILROAD COMPANY, ET AL.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed
27 a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, Division 2.

[SEAL.] GEORGE B. McGINTY,
Secretary.

A true copy.

[SEAL.] GEORGE B. McGINTY,
Secretary.

EXHIBIT "C."

Filed October 4, 1920.

Before the Interstate Commerce Commission.

Docket No. 10509.

THE WASTE MERCHANTS ASSOCIATION OF NEW YORK, Complainants,

vs.

WALKER D. HINES, Director General of Railroads, et al., Defendants.

Petition for rehearing and reargument.

To the Honorable Interstate Commerce Commission:

The following named firms, corporations and individuals: Atterbury Brothers, Inc., 145 Nassau Street; Atterbury & McKelvey, Inc., 145 Nassau Street; American Wood Pulp Corporation, 347 Madison Avenue; Ira L. Beebe & Company, 132 Nassau Street; Nat E. Berzen, 309 Water Street; E. Butterworth & Company, 132 Nassau Street; Box Board & Lining Company, 10 Grand Street; Castle, Gottheil & Overton, 200 Fifth Avenue; Chase & Norton, Inc., 277 Water Street; George Carrizzo & Company, 424 Third Avenue, Brooklyn; P. Costarino, Inc., 150 Nassau Street; P. Cardinale, Inc., 605 Seventh Street, Hoboken; Darmstadt, Scott & Courtney, 178 South Street; A. De Angelis & Company, 12 Park Avenue, Brooklyn; Michael Flynn, 61 Congress Street, Brooklyn; R. Goldstein & Son, 200 Fifth Avenue; Gatti, McGuadd Company, 200 Fifth Avenue; Gotham Paper Stock Company, 31 Ferry Street; Wm. Hughes & Company, 84 Metropolitan Avenue, Brooklyn; Daniel M. Hicks, Inc., 140 Nassau Street; Main Paper Stock Company, Inc., 31 Peck Slip; George W. Millar & Company, 692 Broadway; Michael McGuire, 100 Tenth Avenue; Maurice O'Meara Company, 448 Pearl Street; Onondaga Trading Company, 1142 Broadway; Thomas Smith & Son, Inc., 75 Pike Slip; A. Salomon, Inc., 15 Park Row; M. Stramello, 281 Front Street; Troiana & De Fina, 442 Pearl Street;
E. B. Thomas Company, 100 Hudson Street; and Wilkinson
28 Brothers Company, 419 Broome Street, all of New York City, coordinating their efforts under the name "Waste Merchants

Association of New York," respectfully submit this petition for rehearing and reargument of "Waste Merchants Association of New York v. Director General, et al.," which was decided in a report dated June 1, 1920, Docket 10509, because said decision expressed many conclusions of fact and of law, which were and are erroneous, and because new evidence has now been discovered.

The grounds upon which this request for rehearing and reargument is based are as follows:

I. Erroneous conclusions of fact.

II. Erroneous conclusions of law.

III. Newly discovered evidence.

I. Erroneous conclusions of fact.

1. In finding the date of the declaration of war with Germany in April, 1917, as a ground to justify defendant's refusal to observe the tariffs, because the situation complained of developed long before our declaration of war (Witness Salomon, Tr. 24), and some of the claims for reparation were, and are, on file with the Division of Claims of the Commission more than two years prior to the filing of complaint, and because such finding is irrelevant.

2. In finding certain embargoes which were apparently in existence at certain piers, as additional grounds to justify these tariff violations, because the commodity in question was an essential war material exempted from embargoes by Car Service Circular 1—A. U. S. R. R. A. (Complainants' Brief, p. 77), which fact the Commission has completely ignored, and because such finding is irrelevant.

3. In finding that complainants' trucks were delayed by having to stand in the general merchandise truck line, because the evidence shows conclusively that defendants would not accept paper stock through the general merchandise line and complainants' witnesses testified that they were ejected therefrom (Witness Dondero, Tr. 322; Ragone, Tr. 333–5; Spera, Tr. 168–9; Gaccione, Tr. 112–13).

4. In finding that either the shipper or carrier suggested loading, because the evidence shows conclusively that the defendants suggested the arrangement and forced its adoption (Witness Gates, Tr. 211; Dondero, Tr. 320), and because such a finding is irrelevant.

5. In finding and recognizing an agreement contrary to the tariff provisions, because no evidence appears in the entire record to sustain such a finding and defendants' own witness specifically denied its existence.

6. In finding that such an agreement was intended for mutual benefits other than those named in the tariffs, because no evidence to that effect appears of record.

7. In finding that paper stock is a low-grade commodity and moves in large quantities, because such finding is absolutely irrelevant, and because there is no evidence of the comparative volume of movement.

29 8. In finding that complainants fared much better than other shippers, because there is absolutely no evidence of record upon which to base such a conclusion, and, even if true, such a finding is absolutely irrelevant.

9. In finding that not all piers were covered by the testimony, because the Commission through its examiner refused to hear all of complainants' witnesses, and because the defendants' counsel agreed to allow the case to be decided upon the testimony of complainants' witness who had already testified at that time. Neither the Commission nor defendants' counsel has respected this agreement (Tr. 160–66).

10. In finding that the testimony is indefinite in character and in details conflicting, because defendants introduced no witnesses who could give first evidence and the Commission's examiner continued to allow defendants to introduce witnesses who did not have personal knowledge of the facts and upon objection by complainants' counsel the Commission's examiner characterized such witnesses as "responsible heads," while, on the other hand, complainants' witnesses were forced to confine their testimony to personal knowledge.

11. In finding that clear bills of lading were given whenever checkers were furnished to shippers, because the evidence shows that checkers often tallied shipments, but complainants' members were forced to accept "shipper's load and count" bills of lading, regardless of that fact (Witness Dondero, Tr. 318; Troiano, Tr. 175–6).

12. In finding that other more valuable freight was loaded by the carriers, because such finding is not supported by the evidence of record, and is irrelevant.

13. In finding that delay in settling claims is and was the only hardship imposed by "shipper's load and count" bills of lading, because the record shows that such limited receipts cause many other hardships to be suffered by complainants (Witness Gaccione, Tr. 107–8; Chase, Tr. 80).

14. In finding that complainants would have suffered greater delay if they had insisted upon the tariff provisions, because such finding is entirely irrelevant, and because there is no evidence of record to sustain such conclusion.

15. In finding that any consideration other than the transportation service named in tariffs was received by complainants on account of such violations of the tariffs, because no evidence appears of record to sustain such a conclusion, and because such finding is irrelevant.

16. In finding that the obligation created by the tariffs is an exception in favor of shippers at New York, because such finding is irrelevant and there is no evidence of record to sustain it.

17. In finding that the charges for the transportation services exclusive of loading were not excessive, because such a finding is irrelevant and the transportation services taken without the terminal services were and are not in issue.

18. In finding that no allowance was published in defendants' tariffs, because all the tariffs provide:

30 "Where consignors or consignees load or unload the cars, an allowance of 12 cents per ton with a minimum of $2 per car, may be made for such loading or unloading, except on pressed meats, not boxed or crated and bananas in carloads, consignors or consignees will be required to load or unload from cars and an allowance of 12 cents per ton subject to minimum of $2 per car, will be made."

"Allowance for loading or unloading lighters, barges of cars on floats.

"An allowance for actual cost not to exceed 12c. per ton of 2,000 lbs. or 2,240 lbs. as rated may be made to consignor or consignee within lighterage limits or loading or unloading lighterage freight to or from this company's lighters or barges when such service is performed by consignors or consignees. Shippers or consignees or consignees at points beyond the free lighterage limits must when required furnish all labor necessary to load or unload lighters or barges or cars on floats, for which service allowance of 12c. per ton of 2,000 lbs. or 2,240 lbs. as the case may be, subject to a minimum of $2.00 per car will be made" (Complainants' Brief, pp. 53–4), and because the Commission found that such allowances were applicable to cars on floats in Investigation and Suspension Docket 572, Lighterage and Storage Regulations at New York, New York, 35 I. C. C., 49.

"Under present regulations when the shipper or consignee is entitled to lighterage free, but prefers car float service if the minimum number of cars or tonnage equivalent is offered the carriers place the cars on car floats without additional charge. If the loading or unloading is performed by the shipper or consignee the carrier allows him 12c. per ton with a minimum of $2.00 per car" (Complainants' Brief, p. 59), and in the following case the Commission discussed the question: Swift & Company v. Atlantic Coast Line Railroad Company, et al., 42 I. C. C., 83.

"We are of the opinion and find that under the tariff rule in effect at the time the shipments in question moved, the complainant was entitled to an allowance of 12 cents per ton, subject to minimum of $2 per car, on all fresh meats in bulk loaded by it into cars on floats at the port of New York. Defendants will be expected to make prompt settlement accordingly."

The Commission has entirely ignored the tariff provisions and the foregoing decisions.

19. In finding that the shippers performed this service voluntarily and for their own convenience, because no evidence appears to sustain such finding, and because the evidence shows, on the contrary, that many protests were made, and on February 14, 1918, a consolidated written demand was made by complainants upon the defendants to pay for this service, which the defendants refused to do, and in reply informed complainants that Rule 8-B of the Official Classification

would be observed instead of the tariffs (Complainants' Brief, pp. 92–128).

31 Erroneous conclusions of law.

20. In finding and recognizing a contract between shipper and carrier other than that set forth and controlled by the tariffs lawfully filed and published, because there is no evidence of record to sustain such a finding and if such a contract existed it has no standing in law and cannot be recognized by either the shipper, carrier or court, and because the tariffs are the law and legal cognizance of any extraneous agreement is contrary to public policy, and because the Commission in the following cases said:

Schultz-Hansen Company *v.* Southern Pacific Company, et al., 18 I. C. C., 234:

"We further find that the defendants have not in the past and do not now comply with the provisions of their tariffs with respect to the services rendered and the charges therefor. They will, of course, cease and desist from the practice of rendering services and from assessing charges not in accordance with the provisions of their published tariffs."

M. C. Peters Mill Company *v.* Chicago, Burlington & Quincy Railroad Company, 38 I. C. C., 245:

"The fact that the rule was published by the defendant to meet the special demands of the complainant and was understood by both to cover the complainant's requirements is immaterial, for the tariff on its face admits of no such construction as the parties in interest now give to it. In Poor Grain Co. *v.* C. B. & Q. Ry. Co., 12 I. C. C., 418, it was said that a rate when published by a carrier in the form provided by law was as binding upon it as if that rate had been established by legislative enactment, and that it could not be departed from either by the carrier or the shipper except and until, in due course and in the manner prescribed by law, it had been found by the Commission to be unreasonable or discriminatory or otherwise unlawful under the act to regulate commerce. The same principle would seem to govern transit and other special services provided in the tariffs of carriers: they must be enforced in accordance with their terms, and when the provisions are clear and free from ambiguity no agreement between the shipper and the carrier assigning another meaning to them may lawfully be submitted. Nor, indeed, may this Commission sanction a departure from their plain meaning until, in a proper proceeding and upon a proper record, such rules have been found to be unlawful under the act. No such record has been made here."

and because as a matter of law the person who performs a part of the transportation service is entitled to receive just compensation, in money, therefor, regardless of how or why it was performed. See Union Pacific Railroad Co. *v.* Updike Grain Co., 222 U. S., 215.

21. In finding that defendants' refusal to issue clear bills of lading to complainants was not unlawful, because the act to regulate commerce provides:

32 "Sec. 20. That any common carrier, railroad or transportation company subject to the provisions of this act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State, or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."

The bills of lading act provides:

"Sec. 20. That when goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract rule, regulation, or tariff, 'Shipper's weight, load, and count,' or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this sec-

tion, said words shall be treated as null and void and as if not inserted therein."

"Sec. 21. That when package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition that — were said to be by the consignor. The carrier may also by inserting in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: Provided, however, Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words 'Shipper's weight,' or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."

and because the Commission held in Louisiana State Rice Milling Company v. M. L. & T. Railroad and Steamship Co. et al., 34 I. C. C., 512:

"It does not appear that this rule operates to the limit of liability of the carrier for the full value of the property shipped, but in its application to a claim for loss because of alleged failure to deliver the whole amount transported has the effect of placing the burden upon the shipper who loads on his private side track to prove that the amount specified was loaded and that a less amount was taken out of the car by the consignee, whereas in the case of a receipt not so qualified the burden is upon the carrier to prove that the amount specified in the bills of lading was either not in fact loaded or was delivered, or otherwise to settle for the full value thereof.

"It should be borne in mind that the shipper is not denied his right to an unqualified receipt in any case in which delivery is tendered to the carrier at any of its public stations where it provides facilities for the receipt and delivery of freight."

and because to find such set facts to be not unlawful is contrary to public policy and gives a legal effect to such facts contrary to the general law of common carriers and the act to regulate commerce, and the bills of lading act.

34 22. In finding that the only result of forcing a "shipper's load and count" bill of lading on a shipper is delay in settlement of claims, because such bill of lading is a limited receipt and its issuance under these facts is in violation of the bills of lading act and the act to regulate commerce, because it unlawfully changes the liability of the carrier.

23. In finding that the through rates exclusive of the loading service were not unlawful, because the loading service is an inseparable part of the through transportation and is so stated by the Commission as follows (Investigation and Suspension Docket No. 572, 35 I. C. C., 49):

"It is a long established custom of the railroads to perform the loading and unloading of freight to and from lighters, both carloads and less than carloads, whether at pier or stations or at outside piers and to include the service in that covered by the freight rate."

and because the transportation service excluding the loading or terminal service was not and is not in issue here, and because any reduction of the through service is prima facie unreasonable unless a corresponding reduction in rate is also made.

Investigation and Suspension Docket No. 513. Rates to or from certain points in the Chicago Switching District, 34 I. C. C., 242:

"The law has been clearly laid down in Interstate Commerce Commission v. Diffenbaugh, 222 U. S., 42; United States v. B. & O. R. R., 225 U. S., 306, 231; — U. S., 274, and the Tap Line cases, 234 U. S., 1, and it is our duty to loyally accept and follow the principles so established.

"For each rate, a carrier offers and obligates itself to perform a certain amount of service. If the service so offered and for a long time performed in consideration of that rate includes taking the property transported from a given point and delivering it at a given point, the delivery at that point is in no sense a 'free service.' The carrier may increase the rate or it may curtail the service performed for that rate, but if such action is challenged it must bear the burden of showing that the new rate or service is reasonable and free from unjust discrimination."

24. In finding that there was no allowance published in the tariffs for such loading service when performed by complainants, because the defendants' tariffs during the period in question and at the present time all provide:

"Where consignors or consignees load or unload the cars, an allowance of 12 cents per ton with a minimum of $2 per car, may be made for such loading or unloading, except on pressed meats, not boxed or crated and bananas in carloads, consignors or consignees will be required to load or unload from cars and an allowance of 12 cents per ton, subject to minimum of $2 per car, will be made.

"Allowance for loading or unloading lighters, barges or cars on floats.

"An allowance for actual cost not to exceed 12c. per ton of 2,000 lbs. or 2,240 lbs. as rated may be made to consignor or consignee within lighterage limits or unloading lighterage freight to or
35 from this company's lighters or barges when such service is performed by consignors or consignees. Shippers or consignees at points beyond the free lighterage limits must when required furnish all labor necessary to load or unload lighters or barges or cars or floats, for which service an allowance of 12c. per ton of 2,000 lbs. or 2,240 lbs. as the case may be, subject to a minimum of $2 per car will be made" (Complainants' Brief, pp. 53–4).

25. In finding that defendants could not lawfully compensate complainants for the services performed, because there is nothing, regardless of the tariffs, in the law to prevent a carrier from hiring an instrumentality or service instead of performing that function itself. Interstate Commerce Commission v. Diffenbaugh, 22 U. S., 42 and Union Pacific Railroad Co. v. Updike Grain Co., 222 U. S., 215.

26. In finding that nothing in the act requires that a shipper be reimbursed for transportation service that he may elect to perform primarily for his own convenience, because such a construction of the law would induce rebates and, therefore, is contrary to public policy and in violation of the act to regulate commerce, and because such a conclusion substantially gives to the facts of record an erroneous legal effect, and because no such element or thing as "shipper's convenience" exists in law, and because to uphold or approve and recognize the term "shipper's convenience" as legal tender under the act to regulate commerce, is in violation of the letter, spirit and purpose of the said act as expressed by the Supreme Court of the United States in Louisville and Nashville Railroad Co. v. Mottley, 219 U. S., 467; Penna. Railroad Co. v. International Coal Mining Co., 230 U. S., 184; Armour Co. v. U. S., 209 U. S., 56; Mitchell Coal and Coke Co. v. Penna. Railroad Co., 230 U S., 247; A. T. & S. F. Ry. Co. v. Carl, 227 U. S., 639; and in Tap Line Cases, 234 U. S., 1, and by the Commission in Investigation and Suspension Docket No. 513, 34 I. C. C., 242.

27. In finding that section 15 of the act to regulate commerce is merely intended to provide against excessive allowance, because such construction is contrary to the spirit and purpose of the act to regulate commerce as expressed by the Supreme Court of the United States in Interstate Commerce Commission v. Diffenbaugh, 222 U. S., 42.

"The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter he shall pay for them. That is taken for granted in section 15; the only restriction being that he shall pay no more than is reasonable, and the only

permissive element being that the Commission may determine the maximum in case there is complaint."

Also in Union Pacific Railroad Co. v. Updike Grain Co., 222 U. S., 215.

"This relieved the carrier of the expense of building similar structures and avoided the delay of having the grain transferred from one car to another by the slow process of shoveling. When the
36 service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or some other person hired for the same purpose."

Also U. S. v. B. & O. Railroad Co., 231 U. S., 274; and because such construction would nullify the rules, regulations and exceptions now contained in the tariffs lawfully filed and published and would open the door to special privileges and subterfuges.

28. The findings as expressed by the Commission in conclusion give to the facts of record in this case a legal effect which compels shippers who pay the full tariff rates to accept limited receipts from the carriers for goods delivered for shipment at the carrier's public stations where employees are maintained for the receipt and delivery of freight, and, in addition to the payment of the said tariff rates, to contribute a thing of value, to wit: a loading service which the carrier is under obligation to perform, in order to secure transportation, and such legal effect works to deprive shippers of property without due process of law and therefore is in violation of Article V of the (Bill of Rights) Constitution of the United States, which provides as follows:

"No person shall * * * be deprived of * * * property without due process of law."

29. Although the violations set forth in the complaint continue, the Commission has failed and refused to consider complainants' prayer for the establishment of a reasonable allowance to apply in future, as well as a basis for reparation.

30. The refusal of the Commission through its examiner to allow all of complaints' witnesses to testify was prejudicial to complainants' interests.

31. The allowance by the Commission through its examiner of the introduction of secondary evidence by the defendants was prejudicial to complainants' interests.

New evidence.

32. Complainants have discovered certain material facts which deal with the actual cost of the loading service and which were not available at the hearing.

33. Complainants now have available two material witnesses to explain the manner and cost of performing the loading service who were not available at the time of the hearing.

34. Complainants are now able to present the question of fixing certain allowances for lighterage service which was eliminated by agreement at the last hearing.

Wherefore, complainants members for themselves, and for each other, pray that this honorable Commission grant a rehearing and reargument of the facts and law set forth in the complaint, in order that the errors recited above may be corrected.

Respectfully submitted.

ALMY, VAN GORDON & EVANS,
Attorneys for Complainants Members.

ERNIE ADAMSON,
Of Counsel.

37 *Rule to show cause.*

Filed October 4, 1920.

* * * * * * *

Upon consideration of the petition for a writ of mandamus filed in the above entitled cause, it is ordered by the court, this 4th day of October, 1920, that the respondent, Interstate Commerce Commission, be, and it hereby is, required to show cause, on the 15th day of October, 1920, at ten o'clock a. m., or as soon thereafter as counsel can be heard, why the prayers of said petition should not be granted. Provided, that a copy of this order, and of said petition, shall be served upon said respondent not later than October 7th, 1920.

WALTER I. McCOY,
Chief Justice.

Marshal's return.

Served a copy of the within rule on Interstate Commerce Commission by Geo. B. McGinty, Secty., personally: November 4, 1920.

MAURICE SPLAIN,
U. S. Marshal.
K.

Answer of the Interstate Commerce Commission.

Filed October 11, 1920.

* * * * * * *

The Interstate Commerce Commission, the respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

I.

Answering paragraph I of the petition, respondent denies that this court has original jurisdiction in mandamus for or in respect to the matters and things set forth in said petition.

II.

Answering paragraph II of the petition, respondent admits that the allegations contained in this paragraph are true.

38

III.

Answering paragraph III of the petition, respondent admits that the allegations contained in this paragraph are true, except that the language alleged to be in subsection "A" of section 15 of the act to regulate commerce is instead in section 15a of said act.

IV.

Answering paragraph IV of the petition, respondent admits that the allegations contained in subdivision (a) are true, except that a copy of the petition referred to in said subdivision was not attached to the copy of the petition herein, served upon respondent, and therefore, neither admits nor denies that a copy of the petition referred to in said subdivision is attached to the petition filed in this cause and marked "Exhibit A," and made a part thereof. Respondent admits that the allegations contained in subdivisions (b), (c) and (d) are true; alleges that the allegations contained in subdivision (e) are irrelevant and immaterial, and therefore, neither admits nor denies said allegations; admits that the allegations contained in subdivision (f) are true, except that respondent denies that under its rules of practice the proposed report mentioned, in the absence of good reasons to the contrary, would have become in due course the final report and been filed as the report of respondent. Respondent admits that the allegations contained in subdivision (g) are true. As to the allegations contained in subdivision (h), respondent admits that it made, entered and filed a report in the proceeding mentioned, but alleges that a copy of said report was not attached to the copy of the petition served upon respondent, and therefore, neither admits nor denies that a certified copy of said report is attached to the petition filed in this cause and marked "Exhibit B" and made a part thereof; admits that said report so filed by respondent sets forth as conclusions of fact that respondents performed the loading of freight, and that the defendants referred to issued to petitioners the qualified receipts, mentioned; denies that respondent ignored entirely or at all certain portions or any portion of the testimony or exhibits, or gave erroneous legal effect to certain facts and circumstances, or to any fact or circumstance, of record; admits that respondent dismissed the complaint mentioned; denies that respondent dismissed said complaint upon an erroneous conclusion of law that nothing in the act referred to requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience, and denies that respondent erroneously concluded as a matter of law that the provision in section 15 of the act to regulate commerce referred

to is intended merely to provide against excessive allowances. As to subdivision (i), respondent denies that, in the report filed by it as aforesaid, it expressed conclusions or any conclusion either of
39 law or of fact which were or was, or are or is, erroneous, or which give or gave to the facts and circumstances an erroneous legal effect; admits that petitioners filed in respondent's office the petition for rehearing mentioned, in which the petitioners alleged that, in the report so filed as aforesaid, respondent had made many erroneous statements of fact and of law; and admits that said petition for rehearing was denied by respondent on August 7, 1920, but respondent alleges that a copy of said petition for rehearing was not attached to the copy of the petition served upon respondent in this cause, and therefore, neither admits nor denies that a copy of said petition for rehearing is attached to the petition in this cause and marked "Exhibit C," and made a part thereof.

V.

Answering paragraph V of the petition, respondent alleges that for the reasons hereinbefore stated, namely, that neither Exhibit "A," nor Exhibit "B," nor Exhibit "C," mentioned, is attached to the copy of the petition served upon respondent, respondent has no information concerning the contents of said exhibits, or any of them, and therefore neither admits nor denies that the exhibits contain the matters and things mentioned in said paragraph V. In this connection, however, respondent alleges that in the report filed by it as aforesaid, and which is hereby made a part hereof, the facts and circumstances pertaining to each of and all the matters and things covered by said paragraph V are fully and truthfully set forth and respondent denies each of and all the allegations contained in said paragraph V to the extent that they conflict with the allegations or any of the allegations contained in this answer or with the statements or conclusions or any of the statements or conclusions contained in the report filed by respondent as aforesaid. Respondent specifically denies that, either in making, or entering, or filing said report it arbitrarily or otherwise ignored illegal practices, or any illegal practice, or arbitrarily or without warrant or otherwise ignored certain matters of evidence, or any matter of evidence, which appear or appears in the record mentioned in said paragraph V.

VI.

Answering paragraph VI of the petition, respondent disclaims information sufficient to form a belief as to whether petitioners have been or are advised that they are, as a matter of law, as alleged in said paragraph, entitled to receive compensation from carriers for loading shipments at places named in tariffs, or whether petitions have been or are advised that, as a matter of law, as alleged in said paragraph, the carriers are bound to issue, in each instance, a clear

receipt or bill of lading, under the circumstances described in said paragraph.

40 VII.

Answering paragraph VII of the petition, respondent alleges that each of the allegations contained in this paragraph is a conclusion of law, and that, therefore, respondent neither admits nor denies any of said allegations.

VIII.

Answering paragraph VIII of the petition, respondent alleges that each of the allegations contained in this paragraph is a conclusion of law, and that, therefore, respondent neither admits nor denies any of said allegations.

All of which matters and things respondent is ready to aver, maintain, and prove, as this honorable court shall direct, and thereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By P. J. FARRELL, *Chief Counsel.*

CITY OF WASHINGTON,
District of Columbia, ss:

Robert W. Woolley, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named respondent, and makes this affidavit on behalf of said respondent that he has read the foregoing answer and knows the contents thereof and that the same is true.

ROBERT W. WOOLLEY.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 11th day of October 1920.

ALFRED HOLMEAD, [SEAL.]
Notary Public.

Demurrer to answer.

Filed October 16, 1920.

* * * * * * *

The petitioners say that the answer of the respondent filed in the above entitled cause is bad in substance.

ERNIE ADAMSON AND
BELL, MARSHALL & RICE,
Attorneys for Petitioners.

NOTE.—Among the points of law to be argued upon the hearing of this demurrer are the following:

1. That said answer states no facts which, if true, constitute a defense herein, or show any reason why the relief prayed for in the petition should not be granted.

41 2. That said answer admits in substance the allegations of the petition, to wit: That the carriers named in the complaint filed with the respondent did and do violate their duly filed and published tariffs, and issued to your petitioners limited receipts for freight delivered at public stations for transportation; but denies the jurisdiction of this court to grant your petitioners' prayers for relief.

3. That said answer sets up no defense to the allegations of the petition.

4. That said answer further admits that your petitioners have filed a petition with the respondent praying for a rehearing, and that said petition has been denied.

5. That said answer, although admitting in substance the allegation of the petitioners that respondent did dismiss the original complaint filed before it according to law, nevertheless denies that said dismissal was an arbitrary action.

6. That said answer, although admitting that the carriers named as defendants in the original complaint did and do violate the provisions of their duly filed and published tariffs, and that the said original complaint was dismissed without relief; nevertheless denies that the said violations of the duly filed and published tariffs and illegal practices have been ignored arbitrarily or without warrant, and fails to set up any facts to justify the action of the respondent in the premises.

7. Although said answer admits that your petitioners have performed transportation services which the carriers named as defendants in the original complaint were legally obligated to perform; nevertheless sets up no facts to justify respondent's refusal to proceed in the manner required by law to effect restitution and grant your petitioners a reasonable compensation, to which they are as a matter of law entitled.

8. That said answer admits that the original complaint was duly filed according to law, but contains nothing which justifies the refusal of respondents to consider and fix the amount of the damages prayed for in said complaint.

9. Said answer admits that respondent has found as a conclusion of fact that the carriers named as defendants in the original complaint did and do violate the provisions of their duly filed and published tariffs; but contains nothing to justify the refusal of respondent to issue an order as required by law, commanding said carriers to cease and desist from such violations of the act to regulate commerce.

10. Said answer does not deny that your petitioners have been compelled to furnish a thing of value to the carriers named as defendants in the original complaint, in addition to the duly filed and published rates, in order to secure transportation of their freight.

11. Said answer fails to deny that your petitioners have suffered damages on account of the violations of the carriers named as de-

fendants in the original complaint of their duly filed and published tariffs.

12. Said answer does not deny that the said acts of the car-
42 riers named as defendants in the original complaint, which were in violation of their duly filed and published tariffs, were unlawful.

13. That the conclusions of law set forth in said answer are erroneous.

Memorandum overruling demurrer.

Filed December 2, 1920.

* * * * * * *

The insurmountable objection to granting any relief to the relators is that they participated to their advantage in the transactions of which they now complain. They seek to have that advantage ignored and only the burden to them considered. If there was any violation of the law they participated in it.

The demurrer is overruled.

WALTER I. MCCOY,
Chief Justice.

December 1, 1920.

Supreme Court of the District of Columbia.

Thursday, December 2, 1920.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy, presiding.

* * * * * * *

The demurrer of petitioner to the answer of respondent to rule to show cause having heretofore been argued and submitted to the court, it is considered that said demurrer be, and the same is hereby overruled; whereupon the petitioner now in open court says that it will stand upon its demurrer.

Therefore it is considered that the rule to show cause herein be, and the same is hereby discharged, the petition is dismissed, and that the respondent recover against petitioner the costs of its defense, to be taxed by the clerk, and have execution thereof.

From the foregoing the petitioner by its attorney in open court notes an appeal to the Court of Appeals, and the penalty of a bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100.), or, in lieu thereof a deposit of fifty dollars ($50.).

Memorandum.

December 18, 1920.—$50 deposited in lieu of undertaking on appeal.

43 *Assignment of errors.*

Filed December 18, 1920.

* * * * * * *

The court erred:

(1) In holding "The insurmountable objection to granting any relief to the relators is that they participated to their advantage in the transactions of which they now complain."

(2) In holding, "They seek to have that advantage ignored and only the burden to them considered."

(3) In holding, "If there was any violation of the law they participated in it."

(4) In failing to consider the granting of relief for the period from February 14th, 1918, the date of making written protest, to the present time and for the future.

(5) In failing to consider the granting of relief for the period after complaint was filed with the respondent to the present time, and for the future.

(6) In failing to consider the violations of law as found by respondent in its report and admitted in its answer.

(7) In failing to consider the transportation services rendered by petitioners, and which defendant carriers were obligated to perform.

(8) In failing to consider the damages sustained by petitioners on account of the violations of law committed by defendant carriers.

(9) In failing to consider the continuation of the violations of law by defendant carriers.

(10) In refusing to grant petitioners' prayer for certiorari in aid of the petition for mandamus.

(11) In overruling the demurrer and thereby denying relief to which petitioners have a clear legal right.

(12) In refusing to consider petitioners constitutional rights and denying to petitioners due process of law.

ERNIE ADAMSON,
BELL, MARSHALL & RICE,
Attorneys for Relators.

Designation of record.

Filed December 18, 1920.

* * * * * * *

The clerk will please prepare a transcript of record on appeal to the Court of Appeals in the above entitled action, to include the following:

(1) Petition and exhibits (3).

(2) Rule to show cause.

(3) Answer to petition.
(4) Demurrer to answer.
44 (5) Memo. of overruling of demurrer and exception thereto, election of petitioner to stand upon demurrer, and order discharging rule and dismissing petition.
(6) Memorandum of opinion of court.
(7) Memorandum of fixing of cost bond in the sum of $100, or $50 deposit in lieu thereof.
(8) Assignment of error.
(9) This designation.

ERNIE ADAMSON,
BELL, MARSHALL & RICE,
Attorneys for Relators.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 70, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 64361 at Law, wherein United States of America, ex rel. Members of the Waste Merchants Association of New York, a voluntary association, are petitioners and Interstate Commerce Commission is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the City of Washington, in said District, this 26th day of January, 1921.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

Endorsed on cover: District of Columbia Supreme Court. No. 3498. United States of America ex rel. Members of the Waste Merchants Association of New York, a voluntary association, appellant, vs. Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Jan. 27, 1921. Henry W. Hodges, clerk.

45 Monday, April 4th, A. D. 1921.

* * * * * * *

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE Waste Merchants Association of New York, voluntary association, appellant,
vs.
INTERSTATE COMMERCE COMMISSION.
} No. 3498.

The above-entitled cause was submitted to the consideration of the court on the printed record and briefs filed herein by Messrs.

A. H. Bell, P. H. Marshall, and F. J. Rice, attorneys for the appellant, and by Mr. P. J. Farrell, attorney for the appellee.

46 In the Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE Waste Merchants Association of New York, voluntary association, appellants,
vs.
INTERSTATE COMMERCE COMMISSION.
No. 3498.

Opinion.

Mr. JUSTICE ROBB delivered the opinion of the court:

This appeal is from a judgment in the Supreme Court of the District dismissing appellants' petition for a writ of mandamus directing the appellee, Interstate Commerce Commission, to fix the amount of damages or compensation to which appellant alleges it is entitled for services performed for the carriers in connection with the loading of certain freight shipped by it. The case was disposed of on petition, answer, and demurrer to the answer.

Ordinarily shippers are required to load carload freight, but carriers serving New York Harbor points, owing to conditions peculiar to that locality, have undertaken this work and a charge therefor is included in their published tariff rates. In the early part of 1917 shippers of paper stock from New York were informed by the carriers that labor was so scarce and difficult to obtain that the service of loading cars must be performed by the shippers, and thereafter this service was performed by appellant as to freight shipped by it from that point, to the extent of many thousand carloads. A controversy having arisen as to compensation for the performance of this service by the shippers, a complaint was filed by them with the appellee Commission. An examiner was appointed and the undisputed evidence adduced was to the effect above indicated. The examiner recommended that the shippers receive as reparation an amount to be determined on the basis of twelve cents per ton and a minimum of two dollars per car. A hearing before the Commission resulted in a report on June 1, 1920, the Commission holding
47 that the variance from the practice of the tariff undertakings was as much in the interest of the shippers as of the carriers; that the rates collected were not unreasonable, unjustly discriminatory, or unduly prejudicial for the transportation service rendered, although, in reviewing the evidence, the Commission found: "There is no evidence to indicate that the rates or the charges paid on complainant's shipments were excessive for the total transportation service actually rendered to them by the carriers, excluding loading." In its report the Commission said: "It is undisputed that defendants did not load a large part of complainant's members' paper stock into cars during this period, contrary to their tariff undertaking and that employees of these shippers actually performed the loading

service." The Commission then pointed out that, owing to unusual conditions, it was to the advantage of the shipper to be permitted to do the loading, as otherwise there would have been great delay and a corresponding limitation in the amount shipped. The Commission then said: "Either the carriers or the shippers suggested that the movement of paper stock would be facilitated if the shippers were willing to load their paper stock into empty cars for outbound movement. The evidence is somewhat conflicting as to the origin of this suggestion. However, from the evidence as a whole, there is little doubt that an agreement, tacit or expressed, was arrived at between the carriers and the shippers of paper stock by which the latter undertook to do their own loading of the cars if they were permitted to drive their trucks on to the piers of the former with but short periods of waiting." This arrangement the Commission found to have been "for the mutual benefit of both parties under the extraordinary conditions of war times," but also said: "It is obvious as pointed out above, that the carriers did not fulfill their complete obligation under the tariffs during the prevalence of war conditions, and as a consequence the shippers were compelled to
48 incur the expense of loading by means of their own employees."

Further allusion to the departure of the carriers from their published tariffs was made in these words: "For any failure to observe their published tariffs the carriers may be answerable in another process."

In sec. 15 of the act of June 29, 1906 (34 Stat. 584), amending "An act to regulate commerce," it is provided: "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section." In Interstate Com. Comm. vs. Diffenbaugh, 222 U. S. 42, it was held that contracts made by various railroads for elevation expenses of grain at points of transshipment at rates not exceeding those fixed by the Commission as reasonable, did not amount to illegal discriminations or rebates when paid to owners of elevators on their own grain, although such owners performed services other than those paid for at the same time to their own advantage. It was further held that the act of 1906 contemplates payment of reasonable compensation by carriers for services rendered or facilities furnished by owners of property transported, the only power of the Commission being to determine the maximum of such compensation. After quoting that part of sec. 15 above set forth, the court said: "Thus Congress clearly recognized that services such as those rendered by Peavey & Co. were services in trans-

portation and were to be paid for notwithstanding the possibility that some advantage might be gained as a result." Later in
49 the opinion the court said: The law does not attempt to equalize fortune, opportunities, or abilities. On the contrary, the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. This is taken for granted in sec. 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, sec. 12, 36 Stat. 539, 551)." In Union Pac. R. R. vs. Updike Grain Co., 222 U. S. 215, where a railroad company had refused to pay the owner of an elevator located on other railroads compensation for elevating grain similar to that paid to owners of elevators located on its own railroad, because of failure to return cars within an unreasonable time fixed by that railroad, the court said: "When the service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or some other person hired for the same purpose. Having earned the compensation, the elevator company could not be deprived of its right because foreign cars were not returned to the Union Pacific under the rules of the railway association, of which the Union Pacific was a member and over which the elevator companies had no control."

It thus appears that the Supreme Court, prior to the ruling of the Commission in this case, had interpreted sec. 15 as clearly contemplating that for any legitimate service performed for the carrier by a shipper the Commission, either upon its own motion or after complainant, should make a reasonable allowance. In the present case the Commission has found that service was performed but it has declined to make any allowance whatever, because satisfied that the arrangement was to the mutual advantage of the parties. The Commission in its report said: "Nothing in the act requires that a shipper must be reimbursed for transportation service that he
50 may elect to perform primarily for his own convenience" and that sec. 15 of the act "is intended merely to provide against excessive allowances." This conclusion, in our view, is inconsistent with the interpretation placed upon the statute by the Supreme Court. It must be presumed that every arrangement contemplated by the statute would be to the mutual advantage of the parties, else it would not be entered into in the first place. There is nothing in the statute upon which to base a conclusion that Congress intended to withhold compensation from shippers performing proper services for a carrier where, as here, the arangement was for their mutual advantage, the theory of the statute evidently being that the carrier, receiving from the shipper services which, under the carrier's tariff schedules, it was obliged to perform, should in fairness be compelled

to make reasonable allowance therefor—and this, as we read its decisions, is what the Supreme Court has held.

In view of the surrounding circumstances as disclosed by the record, and he absence of a finding to the contrary by the Commission, it is fair to assume that when these services were performed by the shippers they expected to be reasonably compensated therefor. Certainly it is nowhere suggested that their arrangement with the carriers did not contemplate compensation. The Supreme Court having held that reasonable compensation to a shipper for legitimate services rendered the carrier does not constitute a rebate or discrimination, it logically follows that the Commission may not allow compensation in one case and withhold it in another, where similar services have been performed, for such a course would constitute discrimination in favor of one shipper and against the other. In our view the test as to the right to compensation is the bona fides of the transaction—whether, in the light of surrounding circumstances, there was a reasonable and proper basis for the performance of the services.

51 That there was such a basis in the present case is not disputed. The carrier could not fulfill its tariff undertaking and entered into an arrangement with the shipper whereby the shipper in good faith performed services which, under the law, the carrrier should have performed. Under these facts, the shipper was "entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed." United States vs. Balt. & Ohio R. R. Co., 231 U. S. 274, 293.

The question then presents itself as to whether mandamus is the proper remedy. The solution of this question likewise is to be found in a decision of the Supreme Court. In Kansas City So. Ry. vs. Interstate Com. Comm., 252 U. S. 178, the Commission had failed to give force and effect to a statute requiring it to report, inter alia, the present cost of condemnation and damages or of purchase of the lands, rights of way and terminals of carriers in excess of their original cost or present value, apart from improvements. After stating the case the learned Chief Justice, who wrote the opinion, said: "It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. * * * We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess."

In the present case the Commission's conclusion of law is inconsistent with its finding of fact, and this inconsistency results from a

misconception of the statute, as interpreted by the Supreme
52 Court. The complaint is not that the Commission has erred in the exercise of its discretion, but rather that its failure to give effect to the plain mandate of the statute amounts to a refusal to exercise any discretion under the statute. This circumstance, as indicated by the Supreme Court in the case just reviewed, justified the remedy sought, no other adequate remedy being available.

The judgment is reversed, with costs, and the cause remanded with directions to issue the writ.

Reversed and remanded.

Mr. Chief Justice Smyth dissents.

53 Monday, December 5th, A. D. 1921.

* * * * * * *

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE Waste Merchants Association of New York, voluntary association, appellant, *vs.* INTERSTATE COMMERCE COMMISSION.	No. 3498. October Term, 1921.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to issue the writ.

Per Mr. JUSTICE ROBB.

December 5, 1921.

Mr. Chief Justice Smyth dissents.

54 In the Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE WASTE Merchants Association of New York, a voluntary association, appellant, *v.* INTERSTATE COMMERCE COMMISSION, APPELLEE.	No. 3498.

Motion for writ of error.

Comes now the appellee, Interstate Commerce Commission, and moves the court for a writ of error to remove the above-entitled cause to the Supreme Court of the United States.

P. J. FARRELL.
Attorney for Appellee.

Service of a copy of this motion for writ of error is hereby acknowledged.

BELL, MARSHALL & RICE.

55 (Indorsed:) In the Court of Appeals of the District of Columbia. No. 3498. United States of America ex rel. members of the Waste Merchants Association of New York, a voluntary association, appellant, v. Interstate Commerce Commission, appellee. Motion for writ of error. P. J. Farrell, attorney for Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Dec. 21, 1921. Henry W. Hodges, clerk.

56 Saturday, December 24th, A. D. 1921.

* * * * * * *

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE WASTE Merchants Association of New York, voluntary association, appellant, *vs.* INTERSTATE COMMERCE COMMISSION.	No. 3498.

On consideration of the motion for the allowance of a writ of error to remove the above-entitled cause to the Supreme Court of the United States, it is ordered by the court that said writ issue as prayed.

57 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals before you, or some of you, between United States of America ex rel. members of the Waste Merchants Association of New York, voluntary association, appellant, and Interstate Commerce Commission, appellee, a manifest error hath happened, to grant damage of the said appellee, Interstate Commerce Commission, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 24th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

58 UNITED STATES OF AMERICA, *ss:*

To United States of America ex rel. members of the Waste Merchants' Association of New York, voluntary association, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Interstate Commerce Commission is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, justice of the Court of Appeals of the District of Columbia, this 24th day of December, in the year of our Lord one thousand nine hundred and twenty-one.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged Dec. 28, 1921.

P. H. MARSHALL,
Counsel for Defendant in Error.

59 In the Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE Waste Merchants' Association of New York, a voluntary association, appellant, *v.* INTERSTATE COMMERCE COMMISSION, *appellee.*	No. 3498.

Assignment of errors.

In error to the Court of Appeals of the District of Columbia.

Comes now the appellee in the above-entitled cause, by P. J. Farrell, its attorney, and says that, in the record, proceedings, decision, and final judgment of the Court of Appeals of the District of Columbia, in the above-entitled cause, which was instituted by the appellant in the Supreme Court of the District of Columbia and brought by the appellant to said Court of Appeals by appeal, there is manifest error to the prejudice of this appellee in this, to wit:

First. That said Court of Appeals erred in entering judgment reversing the judgment of the Supreme Court of the District of Columbit with costs and ordering the issuance of a writ of mandamus in effect requiring appellee to fix, and to require by order certain
60 common carriers to pay to appellant's members, compensation

for services performed by the latter in loading shipments of paper stock into cars at New York Harbor points.

Second. That said Court of Appeals erred in making findings of fact inconsistent with the findings of fact contained in the report of appellee upon which is based its order dismissing the complaint of appellant.

Third. That said Court of Appeals erred in holding that it is the duty of appellee, under paragraph (13) of section 15 of the interstate commerce act, and upon the facts disclosed by the record in this case, to fix and require the payment, as aforesaid, of said compensation.

P. J. FARRELL,
Attorney for Appellee.

Dated Washington, D. C., December 27, 1921.

Service of a copy of this assignment of errors is hereby acknowledged.

——— ———.

61 (Indorsed:) In the Court of Appeals of the District of Columbia. No. 3498. United States of America ex rel. members of the Waste Merchants Association of New York, a voluntary association, appellant, v. Interstate Commerce Commission, appellee. Assignment of errors. P. J. Farrell, attorney for Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Dec. 28, 1921. Henry W. Hodges, Clerk.

62 In the Court of Appeals of the District of Columbia.

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE Waste Merchants Association of New York, a voluntary association, appellant, *v.* INTERSTATE COMMERCE COMMISSION, APPELLEE.	No. 3498.

Designation of record.

The clerk will please prepare a transcript of record on appeal to the Supreme Court of the United States in the above-entitled action, to include the following:

(1) Transcript of record.
(2) Submission of cause to court.
(3) Opinion of court.
(4) Judgment.
(5) Motion for writ of error.
(6) Order allowing writ of error.
(7) Assignment of errors.
(8) Citation.
(9) Designation of record for Supreme Court.

P. J. FARRELL,
Attorney for Appellee.

63 (Indorsed:) In the Court of Appeals of the District of Columbia. No. 3498. United States of America ex rel. members of the Waste Merchants Association of New York, a voluntary association, appellant, v. Interstate Commerce Commission, appellee. Designation of record. P. J. Farrell, attorney for Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Dec. 28, 1921. Henry W. Hodges, Clerk.

64 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 63, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of United States of America ex rel. Members of the Waste Merchants Association of New York, voluntary association, appellant, vs. Interstate Commerce Commission, No. 3498, October Term, 1921, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 28th day of December, A. D. 1921.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsement on cover:) File No. 28,639. District of Columbia Court of Appeals. Term No. 684. Interstate Commerce Commission, plaintiff in error, vs. The United States of America ex rel. Members of the Waste Merchants Association of New York, voluntary association. Filed January 11th, 1922. File No. 28,639.

()

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

INTERSTATE COMMERCE COMMISSION, plaintiff in error, *v.* UNITED STATES OF AMERICA EX REL members of the Waste Merchants Association of New York, etc., defendants in error.	No. 684.

WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

The Solicitor General moves to advance the above-entitled cause for hearing during the present term on a day convenient to the court.

As grounds for this motion it is shown:

Defendants in error filed a complaint before the commission against certain carriers by railroad operating in New York City, and alleged that in loading cars with certain waste material—paper and rags, known as paper stock compressed into bales—for transportation in interstate commerce, the services and certain expenses incurred in connection therewith which they

performed were "connected with such transportation" within the meaning of section 15 of the act to regulate commerce, for which they, as shippers, were entitled to a reasonable compensation from the carriers. The commission dismissed the complaint on the merits, finding "that, under the circumstances, there was no obligation on the part of the carriers to make an allowance to complainant's members for the loading service."

Defendants in error filed a petition in the Supreme Court of the District of Columbia praying that the court issue "the peremptory writ of mandamus requiring and commanding the said respondent to take jurisdiction of, and grant affirmative relief, to wit, the fixing of the amount of damages in the matters and things set forth in said petition."

The commission filed an answer denying the jurisdiction of the court; it also set up the proceedings before the commission as an affirmative defense. The court overruled a demurrer to that answer, the defendants in error elected to stand, and a final order was entered dismissing the petition.

The Court of Appeals reversed the decree and remanded with directions to the Supreme Court to issue the writ.

On writ of error to this court the following questions, *inter alia*, are involved:

1. Whether, after the commission has heard and determined a case on the merits and denied the relief sought, its negative action may be judicially reviewed on a petition for a writ of mandamus filed in the Su-

preme Court of the District of Columbia at the instance of the losing complainant before the commission, and if so—

2. Whether such judicial review goes to the whole case *de novo* or is limited to mere alleged errors of law.

3. Whether defendants in error are entitled to reparation under any form of review.

The opinion and judgment of the Court of Appeals will result in other similar proceedings to control the action of the commission, which should promptly be advised of its course.

Counsel for the carriers, the defendants in error, and the commission, respectively, concur that an early hearing is desirable.

JAMES M. BECK,
Solicitor General.

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IN THE

Supreme Court of the United States,

No. 245, OCTOBER TERM, 1921.

INTERSTATE COMMERCE COMMISSION,
Plaintiff-in-Error,

vs.

WASTE MERCHANTS' ASSOCIATION OF NEW YORK,
A VOLUNTARY ASSOCIATION,
Defendant-in-Error.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION TO FILE A BRIEF *AMICUS CURIÆ* AND TO PARTICIPATE IN THE ORAL ARGUMENT BEFORE THE COURT.

R. W. BARRETT,
Attorney for
The Pennsylvania Railroad Company,
The New York Central Railroad Company,
The Baltimore & Ohio Railroad Company,
The Central Railroad Company of New Jersey,
The New York, New Haven & Hartford Railroad Company,
Erie Railroad Company,
The Delaware, Lackawanna & Western Railroad Company,
Lehigh Valley Railroad Company.

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IN THE

Supreme Court of the United States

INTERSTATE COMMERCE COMMISSION, Plaintiff-in-Error, v. WASTE MERCHANTS' ASSOCIATION OF NEW YORK, a voluntary association, Defendant-in-Error.	No. 684. October Term, 1921.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION TO FILE A BRIEF *AMICUS CURIÆ* AND TO PARTICIPATE IN THE ORAL ARGUMENT BEFORE THE COURT.

The Pennsylvania R. R. Co., The New York Central R. R. Co., The Baltimore & Ohio R. R. Co., The Central Railroad Co. of N. J., The New York, New Haven & H. R. R. Co., Erie Railroad Company, The Delaware, Lackawanna & Western R. R. Co., and Lehigh Valley Railroad Company, by their counsel,

respectfully petition the Court for the privilege of filing a brief *amicus curiæ* and of presenting oral argument before the Court in the above entitled proceeding.

Your petitioners are the real parties in interest in this proceeding. The Waste Merchants' Association of New York petitioned the Interstate Commerce Commission for the award of a large amount of reparation for the alleged performance by its members of services in loading outbound shipments of paper waste to cars for the petitioning carriers and the Director General at their New York Harbor Terminals. After an extended hearing and the presentation of briefs and oral argument to the Commission, it dismissed the petition. The Commission's report is found in 57 I. C. C., at page 686. The complainant then asked the Commission for a rehearing and this was denied. Mandamus proceedings were then instituted in the Supreme Court of the District of Columbia to compel the Commission to issue a reparation order in favor of the complainant. The Supreme Court dismissed the petition for mandamus and an appeal was taken in the Court of Appeals of the District which, in a majority opinion, reversed the lower court and ordered the mandamus to issue. The decision of the Court of Appeals of the District constitutes an interpretation of Paragraph 13 of Section 15 of the Interstate Commerce Act (the Act of June 29, 1906, 34 Stat. 584), which is in reference to compensation to shippers for services performed for carriers.

The pecuniary interests of the carrier petitioners involved by the decision of the Court of Appeals are very great. The amount of reparation sought by the complainant is not definitely shown

in the record, but counsel for the complainant stated in their brief before the Court of Appeals that it would amount to "hundreds of thousands of dollars".

The decision of the Court of Appeals of the District is very broad and includes within its scope a large number of transportation situations in addition to allowances for loading outbound shipments to cars. All kinds of allowance questions heretofore passed upon by the Commission are affected by the decision, including allowances for compressing cotton, for cooperage and grain doors, for the elevation of grain, lighterage allowances, allowances for spotting cars at blast furnaces, etc.

The District Court of Appeals in its opinion interpreted Paragraph 13 of Section 15 of the Act to Regulate Commerce contrary to the interpretation placed upon it by the Interstate Commerce Commission in a large number of decisions covering a period of approximately 15 years since the passage of the Act in 1906.

Your petitioners therefore respectfully pray that they, through their counsel, be permitted to file a brief *amicus curiæ* and to present oral argument to the Court in this proceeding.

RICHARD W. BARRETT,
Solicitor for Petitioning Carriers.

Dated, March 7, 1922.

No. 245

IN THE

Supreme Court of the United States,

No. 684, OCTOBER TERM, 1921.

INTERSTATE COMMERCE COMMISSION,
Plaintiff-in-Error,

versus

WASTE MERCHANTS' ASSOCIATION OF NEW YORK,
A VOLUNTARY ASSOCIATION,
Defendant-in-Error.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF *AMICUS CURIÆ* FOR THE PENNSYLVANIA RAILROAD COMPANY THE NEW YORK CENTRAL RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, AND LEHIGH VALLEY RAILROAD COMPANY.

RICHARD W. BARRETT,
Attorney for CARRIERS.

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INDEX.

CASES CITED.

IN THE

Supreme Court of the United States.

INTERSTATE COMMERCE COMMISSION,
Plaintiff-in-Error,

versus

WASTE MERCHANTS' ASSOCIATION OF NEW YORK, a voluntary association,
Defendant-in-Error.

No. 684.
October Term,
1921.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

I. Statement of the Case.

This is an appeal by the Interstate Commerce Commission from the decision of the Court of Appeals of the District of Columbia. The Waste Merchants' Association of New York petitioned the Commission for the award of a large amount of reparation for the alleged performance by its members of services for the carriers and the Director General at their New York Harbor terminals. The Commission dismissed the petition. The complainant then asked the Commission for a re-hearing and this was denied. Mandamus proceedings were then

instituted in the Supreme Court of the District of Columbia to compel the Commission to order reparation. This court dismissed the bill for mandamus and an appeal was taken to the Court of Appeals of the District which, in a majority opinion, reversed the lower court and ordered the mandamus to issue to the Commission, apparently compelling it to issue an order requiring the carriers and the Director General to pay specific allowances to the complainant's members. The decision of the Court of Appeals of the District constitutes an interpretation of Paragraph 13 of Section 15 of the Interstate Commerce Act (The Act of June 29, 1906, 34 Stat. 584). Paragraph 13 of Section 15 is in reference to compensating shippers for services performed for carriers and is as follows:

> "(13) If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

The Court of Appeals decided that this paragraph of Section 15 not only *empowers the Interstate Commerce Commission, but makes it mandatory upon it,* to fix definite allowances for shippers for services alleged to have been performed for carriers. The application of this decision to the in-

stant case would seem to require the Interstate Commerce Commission under Paragraph 13 of Section 15 to order the carriers to pay large sums of money to the members of the complainant Waste Merchants' Association for their alleged services in loading waste paper to cars for outbound movement from New York Harbor. The Opinion of the Court of Appeals affects the entire problem of allowances to shippers by carriers and requires the Commission to fix definitely these allowances contrary to the provisions of the act which permit it to prescribe the reasonable maximum thereof.

The only statement of facts which is before the court in this proceeding is the report of the Commission in Docket 10509, found in 57 I. C. C. 686 (Transcript of Record, p.). The evidence taken before the Commission is not before this Court. The report shows that the case was submitted to the Commission on February 26, 1920, and decided June 1, 1920, and that all of the carriers having terminals at New York Harbor were defendants. The complainant, the Waste Merchants' Association of New York, is an unincorporated association whose members deal in waste material, and ship paper and rags known as "paper stock", compressed into bales, in carloads from New York City, New York, to points outside of the State of New York. The complaint was filed March 11, 1919, and alleges, *inter alia,* that the railroad defendants in connection with the transportation of paper stock in bales, in carloads, from New York City to interstate points, refused to render the service of loading such shipments to cars for outbound movement and contrary to their tariff provisions, compelled the members of The Waste Merchants' Association to perform this service. As an illustration of carriers' New York

Harbor tariffs in respect of loading outbound shipments to cars, the Commission cites the Pennsylvania Railroad Company's tariff "Exceptions to Official Classification No. 44 I. C. C. 7320", and quotes from it as follows (57 I. C. C. 687) (Transcript, p.):

> "At New York, N. Y., and Brooklyn, N. Y., freight in carloads, other than bulky freight carried at carload rates, received or delivered at New York or Brooklyn stations, as shown in the list of stations and agencies (Note 9), and carrier's warehouses or sheds or over piers or platforms, *will be loaded into and unloaded from cars by the carriers.*"*

The Commission found as follows in reference to the reason carriers load and unload certain carload freight at New York Harbor (57 I. C. C., p. 687):

> "The exceptions at New York Harbor have been brought to pass by conditioning circumstances at that port. Outbound freight is loaded from piers or pier stations into cars standing on floats alongside of piers instead of from trucks into cars on team tracks. Shippers at New York are required to bring their freight to carriers' pier stations and there to unload it to the builkhead, or in instances to take their trucks on to the pier and unload the freight at some point opposite the location of the empty cars standing on floats to receive the freight" (Transcript, p.).

After describing the manner in which freight is handled at New York, it found that the railroad defendants "did not load a large part of complainant's members' paper stock into cars during this period contrary to their tariff undertaking, and that the employees of these shippers (the members

* Italics ours.

of the Waste Merchants' Association) actually performed the loading services". The Commission then asks the question "What were the circumstances which led the carriers to depart from their tariffs and former practice in this respect?" and answers it as follows (57 I. C. C. 688):

> "Shippers of paper stock along with nearly all other shippers in New York and Brooklyn carried their freight in trucks to railroad piers and pier stations. When these trucks of paper stock took their places in long lines of vehicles containing various commodities waiting for a chance to be unloaded at the piers, great delays ensued and the trucking became exceedingly expensive. These delays were largely due to labor shortage. Either the carriers or the shippers suggested that the movement of paper stock would be facilitated if the shippers were willing to load their paper stock into empty cars for outbound movement. The evidence is somewhat conflicting as to the origin of this suggestion. However, from the evidence as a whole, there is little doubt but that an agreement, tacit or expressed, was arrived at between the carriers and shippers of paper stock by which the latter undertook to do their own loading of the cars if they were permitted to drive their trucks on to the piers of the former with but short periods of waiting. The complainant's members thus were enabled to withdraw their trucks from the long lines of vehicles containing miscellaneous commodities and to form lines consisting exclusively of trucks of paper stock.
>
> "That such a mutual arrangement was for the benefit of both parties under the extraordinary conditions of war times can not be questioned. Paper stock is low-grade commodity which ordinarily moves in large quantities and the record indicates that during the period of congestion these shippers were able to forward between 40,000 and 80,000 carloads

> of paper stock. This is persuasive that they fared much better than shippers of certain other commodities who were compelled to wait their turn in the slow process of loading by the carriers' reduced force of labor.
>
> "By no means all of the outbound pier stations in the vicinity of New York harbor were referred to in the testimony which is indefinite in character and in details conflicting."

The court will, therefore, understand that whatever services were performed by these shippers, were performed in consideration of the granting of a privilege to them by the railroads. The Commission found that the advantage secured by the complainants by the agreement made between themselves and the carriers whereby they performed the loading services, for which the carriers paid them by relieving them of the cost of great delay to their trucks, was of much greater value than the cost of the service performed by them. The Commission's findings in this respect were as follows (Transcript, p. , 57 I. C. C. 689):

> "It is obvious, as pointed out above, that the carriers did not fulfill their complete obligation under the tariffs during the prevalence of war conditions, and as a consequence the shippers were compelled to incur the expense of loading by means of their own employees. For the most part, however, had the shippers insisted on their rights under the tariffs, their paper stock would have been received eventually after long delays along with other commodities and loaded by the carriers. Pursuing such a course, they would not have been able to ship nearly as much as they did, and the expense incident to the delays of trucks standing in long lines together with conveyances of other commodities for hours waiting to unload would have far outweighed the expense of loading the cars by their own em-

> ployees. If deprived of some portion of their transportation service extended by tariff, due to war conditions, these shippers received a consideration for such deprivation."

The Commission, therefore, found that these complainants received from the carriers for their loading services, compensation which "would have far outweighed the expense of loading the cars by their (complainants') own employees". The facts may, therefore, be summarized briefly as follows:

Some of the complainants in this case, by arrangements made with the carriers, loaded their shipments to cars for outbound movement and received for this service privileges which compensated them in a reduction of their expenses far in excess of the cost of the loading service performed by them. Having received benefits far in excess of the cost of services performed by them, they now repudiate the arrangement which the Commission found they had made, and appeal to the courts to secure additional compensation under Section 15 of the Act for the performance of services for carriers for which they have already been overpaid.

II. Argument.

(1) The decision of the Court of Appeals of the District of Columbia is based upon a misinterpretation of the Diffenbaugh Case, 222 U. S. 42.

The Court of Appeals of the District of Columbia, for some reason which the record does not disclose, failed to give consideration to the finding of the fact by the Commission that the complainants had been overpaid for any services they may have per-

formed for the carriers, and proceeded to an interpretation of Paragraph 13 of Section 15 of the Interstate Commerce Act. The Court decided (Opinion, Transcript, p.), that Paragraph 13 of Section 15 of the Act not only empowers the Interstate Commerce Commission to grant definite allowances to shippers for services performed for carriers, but makes it mandatory upon the Commission to grant such allowances and fix the amounts thereof.

The Court bases its opinion in reference to the alleged mandatory provisions of Paragraph 13 of Section 15 of the Interstate Commerce Act entirely upon the opinion of the Supreme Court in the Diffenbaugh Case, 222 U. S. 42, as is indicated by the following quotation from the Court's opinion (Transcript, p.):

> "In Sec. 15 of the Act of June 29, 1906 (34 Stat., 584), amending 'An Act to regulate commerce', it is provided: 'If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appopriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.' In Interstate Com. Comm. *v.* Diffenbaugh, 222 U. S., 42, it was held that contracts made by various railroads for elevation expenses of grain at points of transshipment at rates not exceeding those fixed by the Commission as reasonable, did not amount to illegal discriminations or rebates

when paid to owners of elevators on their own grain, although such owners performed services other than those paid for at the same time to their own advantage. It was further held that the Act of 1906 contemplates payment of reasonable compensation by carriers for services rendered or facilities furnished by owners of property transported, the only power of the Commission being to determine the maximum of such compensation. After quoting that part of Section 15 above set forth, the court said: 'Thus Congress clearly recognized that services such as those rendered by Peavey & Co. were services in transportation and were to be paid for notwithstanding the possibility that some advantage might be gained as a result.' Later in the opinion the court said: 'The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the Act of Congress in terms contemplates that if the carrier receives services from an owner of property transported or uses instrumentalities furnished by the latter, he shall pay for them. This is taken for granted in Sec. 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, Sec. 12, 36 Stat., 539, 551).' In Union Pac. R. R. *v.* Updike Grain Co., 222 U. S., 215, where a railroad company had refused to pay the owner of an elevator located on other railroads compensation for elevating grain similar to that paid to owners of elevators located on its own railroad, because of failure to return cars within an unreasonable time fixed by that railroad, the court said: 'When the service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or some other person hired for the same purpose. Having earned the compensation, the

elevator company could not be deprived of its right because foreign cars were not returned to the Union Pacific under the rules of the railway association, of which the Union Pacific was a member and over which the elevator companies had no control.'

It thus appears that the Supreme Court, prior to the ruling of the Commission in this case, had interpreted Sec. 15 as clearly contemplating that for any legitimate service performed for the carrier by a shipper the Commission, either upon its own motion or after complaint, should make a reasonable allowance. In the present case the Commission has found that service was performed but it has declined to make any allowance whatever, because satisfied that the arrangement was to the mutual advantage of the parties. The Commission in its report said: 'Nothing in the Act requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience', and that Sec. 15 of the Act 'is intended merely to provide against excessive allowances'. This conclusion, in our view, is inconsistent with the interpretation placed upon the statute by the Supreme Court. It must be presumed that every arrangement contemplated by the statute would be to the mutual advantage of the parties, else it would not be entered into in the first place. There is nothing in the statute upon which to base a conclusion that Congress intended to withhold compensation from shippers performing proper services for a carrier where, as here, the arrangement was for their mutual advantage, the theory of the statute evidently being that the carrier, receiving from the shipper services which, under the carrier's tariff schedules, it was obligated to perform, should in fairness be compelled to make reasonable allowance therefore—and this, as we read its decisions, is what the Supreme Court has held."

The Court of Appeals misinterpreted and misapplied the Diffenbaugh Case. It involved only the question of the power of the Commission to prohibit certain railroad companies by its order from paying to the owners and lessees of elevators, compensation for the elevation of grain in transit. This compensation had been definitely agreed upon by contract between the elevator companies and the railroads. Judge Sanborn in the court below (176 Federal, p. 409, at p. 410), thus stated the question involved:

> "Has the Interstate Commerce Commission the power to prohibit railroad companies from paying to the owners and lessees of elevators, compensation for the elevation of grain in transit?"

The Court of Appeals selected two sentences from the middle of a paragraph of the opinion in the Diffenbaugh Case (*supra*), the subject matter of which was the fact that the Interstate Commerce Commission based its conclusions of law upon the assumption that to pay an elevator company for elevating grain in transit constituted a rebate, and applied these sentences to the instant case, which is a petition for a mandamus to compel the Interstate Commerce Commission to grant shippers compensation for services which they allege they performed for the carriers, and for which the Commission found the carriers had more than compensated them. The subject matter of the Diffenbaugh Case was the power of the Commission to say that allowances could not be paid shippers by carriers for services performed by them because these allowances constituted rebates. The subject matter of the instant case is the Commission's refusal to award to shippers allowances for transportation services

alleged to have been performed by them because the Commission found that the carriers had overpaid them for the alleged services, and that the services had been performed by them at their own request and for their own benefit. It will readily be seen that any statement of the Supreme Court outlining the law in reference to the question before it in the Diffenbaugh Case, can, only by the greatest stretch of the imagination, be applied to a consideration of the law involved in the instant case.

The particular sentences selected by the Court of Appeals of the District from the Diffenbaugh Case (*supra*), and upon which it bases its entire decision, is the following from page 46, in reference to Section 15 of the Act to Regulate Commerce:

> "The law does not attempt to equalize fortune, opportunities or abilities. On the contrary the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551)."

The Court of Appeals took the view that what the Supreme Court, in the Diffenbaugh Case (*supra*), said Congress *assumed* or *took for granted* was enacted into the terms of the statute. The Supreme Court said nothing of the sort. It simply said that there had been an assumption of a situation, a basis of assumed fact upon which Congress acted in drafting and passing Section 15, and that

was, that carriers *would pay shippers if they hired them to perform services.* All of this was said in reference to rebates and for the purpose of showing that Section 15 left the Interstate Commerce Commission with such power to limit allowances to shippers as would avoid the very danger the Commission found in the Diffenbaugh Case, viz., that these allowances might become rebates.

The Diffenbaugh Case, therefore, stands for the proposition that the Interstate Commerce Commission can not prohibit carriers from paying shippers allowances on the ground that these allowances are rebates, for the reason that Section 15 of the Act contemplates or takes it for granted that such payments will be made, and gives the Commission such power over them that they cannot constitute rebates. The power of the Commission is limited in respect of these allowances to fixing the maximum amount thereof. There is nothing in the Supreme Court's opinion indicating that Section 15 empowers the Commission to grant allowances to shippers or consignees, or makes it mandatory upon the Commission to fix allowances for services alleged to have been performed by shippers for carriers.

(2) History and Purpose of Par. 13 of Sec. 15 of the Act to Regulate Commerce.

The Commission in its Annual Report for 1905 asked for the power to fix allowances for services furnished by shippers to carriers, and for the power to compel the payment of these allowances by order and proposed the following draft of Section 15 (Ann. Rep. 1905, p. 179):

> "If the owner of property transported under this Act directly or indirectly renders any ser-

> vice connected with such transportation, or furnishes any instrumentality used therein, the Commission may, after full hearing of a complaint, determine what is a reasonable charge to be paid by the carrier for the service so rendered or the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

It is to be noted that the Commission asked for power to determine *what is a reasonable charge* to be paid by the carrier for services rendered by shippers and *to fix the amount thereof by order.* By reference to Section 15 of the Act of June 29, 1906, it will be seen that Congress did not grant the Commission the full power requested, but provided that "the charges and allowances" for shippers' services "shall be no more than is just and reasonable", and that the Commission *may* determine after a hearing what *is a reasonable* charge as a *maximum* to be paid by carriers.

The purpose of Par. 13 of Sec. 15 of the Act has an important bearing upon its proper interpretation. This court said in U. S. *v.* Louisville & Nashville R.R. Co., 236 U. S. 318, at page 333, in dealing with another section of the Interstate Commerce Act which was recommended by the Commission in its Annual report for 1905, in which it also recommended Section 15,—that the Act may properly "be read in the light of the purpose it was intended to subserve and the history of its origin." In the United States *v.* The Pennsylvania Railroad Company, 242 U. S. 208, the Supreme Court was largely influenced by the history of the provision of the Act involved, and this provision also grew out of the recommendations

made by the Commission in its Annual report for 1905. The carriers are, therefore, fully justified in insisting that the history and purpose of Section 15 is a most persuasive argument in support of their contentions in respect of its meaning. The purpose of Par. 13 of Sec. 15 of the Act was to prevent rebating by the payment of large allowances by carriers to shippers for their alleged services. In the Commission's Annual Report for 1905 in which it submitted the draft of Section 15 hereinbefore quoted, it made the following statement, pages 10 and 11, in reference to the purpose for which it desired its proposed form of Section 15:

> "There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper; the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another.
>
> "It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a

constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the service can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public if provided by the shipper himself.

"We do think, however, that the Commission should be empowered in a case of this kind to determine whether the allowance to the property owner is a just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

In view of the statement of the Commission itself when it proposed this legislation to Congress, there can be no doubt but that the sole purpose in view was to prevent rebating in the guise of payments to shippers for services alleged to have been rendered by them for carriers. The decision of the Court of Appeals of the District of Columbia turns Section 15 of the Act upside down. It takes the prohibition against the payment of undue compensation to shippers for services rendered by them for carriers, on account of the danger of their being rebates, and changes it into an obligation on the part of the carrier to pay all shippers for such services such sums as the Commission may order. It goes far beyond this. It states that the Commission must award such allowances and that, if it does not, the court under the power to mandamus will compel it to do so. It is respectfully submitted that there could hardly be a case of more remarkable judicial transformation of an Act of Congress than that sub-

mitted to this court in the decision of the Court of Appeals of the District of Columbia. The history of the Act and its purpose, together with its plain wording, are transformed into something that the events upon which the Act was based do not justify and that Congress could not, by any possibility, have contemplated.

(3) The Interpretation of Par. 13 of Sec. 15 of the Act to Regulate Commerce by the District Court of Appeals is contrary to the interpretation of this Paragraph by the Interstate Commerce Commission in numerous decisions for fifteen years.

No clearer statement of the Commission's interpretation of Paragraph 13 of Section 15 of the Act, since its passage by Congress in 1906 can be found than in its opinion in Cambria Steel Company *vs.* Director General, Penna. R. R. Co. *et al.*, 64 I. C. C. 737, at page 740. This was a demand for an increase in allowances for spotting cars by the shipper within its plant at Johnstown, Pa. The Commission thus outlined its attitude, and its interpretation of Section 15:

> "This complaint is brought upon the theory that the transportation service covered by the line-haul rates to and from Johnstown is not completed at the interchange tracks, but includes the entire movement between those tracks and the various points of loading and unloading within the plant; and that defendants have employed complainant to perform that part of the movement which is beyond the interchange tracks. That a carrier may thus by contract employ the owner of property transported to perform a portion of the transportation service is recognized by section 15 of the interstate commerce act. The effect of such a contract with the carrier is to deter-

> mine, as between the parties thereto, the amount to be paid for the services rendered. Our duty, under section 15, is to take care lest the amount paid become so large as to amount, in effect, to an unlawful concession to a shipper from the transportation rate. We may, under that section, determine what is a reasonable charge as the maximum to be paid by the carrier, and fix the same by appropriate order. The Supreme Court has said, in Atchison Railway Co. *v.* United States, 232 U. S. 199, that whatever transportation service or facility the law requires the carriers to supply they have the right to furnish. If the shipper becomes dissatisfied with his bargain he may cease to render the service, and defendants must then provide for service to the extent of their legal obligation. We are without power to require carriers to pay allowances to shippers for spotting. Buckeye Steel Castings Co. *v.* H. V. Ry. Co., 58 I. C. C., 500. *A fortiori*, we cannot compel a carrier to increase an allowance of this kind on the sole ground that it is inadequate to cover the cost to the shipper whom it has employed to perform the particular service."

While it was not necessary for the Commission to express its interpretation of Section 15 in the Waste Merchants' Association Case, it did so in the following words (See 57 I. C. C., p. 686, at p. 689):

> "For any failure to observe their published tariffs the carriers may be answerable in another process. There was no alternate clause in defendants' tariffs providing for the payment of an allowance if the shipper performed the loading service and hence since all allowances to a shipper must be published in the tariffs, even if defendants desired, they could not lawfully have compensated complainant's

members for the loading service rendered by them. Nothing in the act requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience. Section 15 says:

> 'If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished.'
>
> "This provision is intended merely to provide against excessive allowances."

(See also to the same effect Manufacturers Ry. Co. *v.* St. L., I. M. & S. Ry. Co., 28 I. C. C. 93, 101; Farmers Cooperative Association *v.* C., B. & Q. Ry. Co., 34 I. C. C. 60, 65; N. O. Terminal Allowances, 42 I. C. C., 748, 754; Buckeye Steel Castings Co. *v.* H. V. Ry. Co., 58 I. C. C. 500.)

It is respectfully submitted that the fifteen years of consistent interpretation of Section 15 by the Commission is entitled to great weight by the court in finally determining the meaning of the Act. This is especially true in view of the fact that although the Interstate Commerce Act has been amended many times during the period from 1906 to date, it has never been so amended as to change the provisions of Paragraph 13 of Section 15. The Supreme Court said in this respect in New York, New Haven & Hartford R. R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361, at page 401, after conceding

that a certain interpretation given by the Commission in certain cases was correct:

> "We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the reenactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute."

In Logan *v.* Davis, 233 U. S. 613, where an Act of Congress was before the court for interpretation and the practical interpretation of the same for a period of many years by the Secretary of the Interior, was suggested to the court as proper, it said, on page 627:

> "Many thousands of acres have been patented to individuals under that interpretation, and to disturb it now would be productive of serious and harmful results. The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. United States *v.* Moore, 95 U. S. 760, 763; Hastings and Dakota Railroad Co. *v.* Whitney, 132 U. S. 357, 366; United States *v.* Alabama Great Southern Railroad Co., 142 U. S. 615, 621; Kindred *v.* Union Pacific Railroad Co., 225 U. S. 582, 596."

In the National Lead Co. *v.* the United States, 252 U. S. 140, the question of the interpretation of an act of Congress for the payment of drawbacks

to exporters was before the court. The Secretary of the Treasury had been called upon to make a practical interpretation of the Act for many years. The Supreme Court said, on page 145, that it preferred the reasonable interpretation of the Department, and commented in reference thereto as follows:

> "From Edwards *v.* Darby, 12 Wheat. 206, to Jacobs *v.* Prichard, 223 U. S. 200, it has been the settled law that when uncertainty or ambiguity, such as we have here, is found in a statute great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect,—especially where such construction has been long continued, as it was in this case for almost forty years before the petition was filed. United States *v.* Hill, 120 U. S. 169.
>
> "To this we must add that the Department's interpretation of the statute has had such implied approval by Congress that it should not be disturbed, particularly as applied to linseed and its products."

It is respectfully submitted that the interpretation of paragraph 13 of Section 15 of the Interstate Commerce Act, followed by the Commission for fifteen years, and the fact that during this period, while many changes in the Act have been made by Congress, none have been made in the specific section and paragraph before the court, should be very persuasive with the court that the Commission's interpretation has been and is correct.

The Court's attention is called to the fact that it was not until 1920 that Congress gave the Commission the power to establish specific rates by giving it power to establish minimum rates as well as maximum. Prior to that time the only power the

Commission had was to fix the maximum rate and the carrier itself was left free to charge less than this rate if it so desired. It can hardly be conceived that Congress would withhold from the Commission the power to fix specific rates for transportation until 1920, and at the same time give it power to fix specific allowances for services performed by shippers. This is especially apparent from the fact that, when in 1920 Congress gave the Commission the power to fix minimum rates as well as maximum, it did not change paragraph 13 of Section 15 of the Act so that the Commission would have power to fix the minimum as well as the maximum amount of allowances to shippers for services performed for carriers.

The provision of paragraph 13 of Section 15 of the Act empowering the Commission to determine what is a reasonable charge as the maximum which may be paid by the carrier to the shipper for services rendered, is closely related to and contains practically the same wording as the paragraphs of Section 6 of the old Act empowering the Commission to establish through routes and *maximum joint rates* between certain rail and water lines and to establish *maximum proportional rates* under certain conditions, also to the first paragraph of Section 15 of the old act which gave the Commission power in reference to unreasonable or unjustly discriminatory rates, and authorized it to prescribe the just and reasonable rates and charges to be observed *"as the maximum to be charged"*. It is to be noted that Congress never until the passage of the Transportation Act of February 28, 1920, gave the Commission the power to do more than fix the maximum that might be charged for any transportation service of any kind. All of this is very per-

suasive of the correctness of the Commission's fifteen years' uniform interpretation of paragraph 13 of Section 15 of the Act to the effect that it does not empower it to fix definite allowances to be paid by carriers for services performed by shippers, but that these allowances are subject to contract between the parties, and the abuse of the same is safeguarded by the Commission's power to determine the reasonable maximum thereof.

(4) The carrier petitioners could not pay allowances to the shippers for loading shipments of outbound paper waste to cars for the reason that their tariffs contained no provisions covering the payment of such allowances.

The Record shows that none of the railroad petitioners' tariffs contained provisions providing for the payment of allowances to shippers for performing loading services. The Commission in its report, 57 I. C. C., page 689, makes the following finding in this respect:

> "There was no alternate clause in defendants' tariffs providing for the payment of an allowance if the shipper performed the loading service, and hence since all allowances to a shipper must be published in the tariffs, even if defendants desired, they could not lawfully have compensated complainant's members for the loading service rendered by them."

There can be no question in reference to the Commission's finding of fact to the effect that the defendant carriers had no tariff publications containing provisions for allowances to the members of the Waste Merchants' Association. Neither can there be any question in reference to the law as stated by the Commission, viz., that the defendants

could not, even if they desired, pay the Waste Merchants' Association's members for their services for loading outbound shipments, owing to the fact that such payments were not covered by any tariff publications. The Supreme Court stated in Mitchell Coal Co. *v.* P. R. R., 230 U. S. 247, at page 261, that the Commission was empowered under the Act to Regulate Commerce to issue a general order requiring the publication of all allowances to shippers. The Commission said in Rates on Railroad Fuel, 36 I. C. C. 1, at page 4, that it would issue such an order, and on May 17, 1912, it issued Conference Ruling No. 360, which is as follows:

> "ALLOWANCES UNDER SECTION 15—Held, That an allowance purporting to be made under section 15 must be regarded as a concession from the rate unless duly published by the carrier in its tariffs and thus made available to all shippers furnishing a like facility or performing a like service of transportation in connection with their traffic. (See rulings 19, 78, 132, 267 and 292.)"

The Southern Cotton Oil Co. in a suit against the Central of Georgia, 228 Fed. 335, attempted to secure allowances for wharfage. These allowances had not been published in any tariff. The Circuit Court of Appeals for the Fifth Circuit made the following statement in reference thereto, 228 Fed. 335, at page 336:

> "The case, then, is that of a shipper seeking to recover of a carrier for services in connection with a shipment for which no allowance is specified in a filed tariff. The plaintiff was not entitled to a judgment of the court requiring the defendant to pay for services, the payment for which voluntarily by it would be a violation of a statute."

The incongruity of the decision of the Court of Appeals of the District of Columbia is clearly apparent. The Supreme Court in the Mitchell Coal Co. case (*supra*) decided that the Commission had power to compel carriers by a general order to publish in tariffs all allowances to shippers for services. The Commission issued such an order, and has held in numerous cases that no such allowances can be paid shippers unless they have been published in tariffs (see General Electric Co. *v.* N. Y. C. R. R. Co., 14 I. C. C. 237, 242; Best Co. *v.* G. N. R. R. Co., 33 I. C. C. 1, 3; Transportation of Potatoes, 34 I. C. C. 256; Second Industrial Railways Case, 34 I. C. C. 596, 603; Rates on Railroad and Other Fuel, 36 I. C. C. 1, 13.) The allowances have not been published in any tariff and, therefore, the railroads cannot pay them. The inconsistency of the opinion of the District Court of Appeals is thus apparent. In short, it requires the Interstate Commerce Commission to make an order compelling the railroad defendants to pay something they cannot pay because the charges have never been published in a tariff. For this reason alone, the decision of the Court of Appeals of the District cannot stand.

(5) There was no necessity for the District Court of Appeals to interpret Paragraph 13 of Section 15, as the Commission found that the carriers had overpaid the complainants for the services alleged to have been performed by them in loading outbound shipments of paper stock to cars.

A careful examination of the Commission's report in this proceeding indicates that it literally complied with every provision of Paragraph 13 of Section 15 of the Interstate Commerce Act, and that the interpretation of the Act by the District

Court of Appeals was not involved in the proceeding. The Commission found that the carriers had not only paid the shippers a reasonable sum for the transportation services alleged to have been performed by them, but had overpaid them for this service. At the bottom of page 687 of the Commission's report in 57 I. C. C., the Commission asks this question: "What were the circumstances which led the carriers to depart from their tariffs and former practice in this respect?" The Commission here referred to the practice of carriers at New York harbor to load outbound shipments to cars. On page 688 of the report the Commission described in detail the arrangement between the carriers and the shippers whereby the complainant's members were allowed to expedite their shipments over those of other shippers in return for which they loaded them to cars, and called attention in great detail to the value of the concessions given the complainants. The Commission then said:

> "However, from the evidence as a whole, there is little doubt but that an agreement, tacit or express, was arrived at between the carriers and shippers of paper stock by which the latter undertook to do their own loading of the cars if they were permitted to drive their trucks onto the piers of the former with but short periods of waiting. The complainants' members were thus enabled to withdraw their trucks from the long lines of vehicles containing miscellaneous commodities and to form lines consisting exclusively of trucks of paper stock."

The above is the Commission's finding in reference to the agreement and to the effect that it was carried out. The Commission then commented

upon the value of the privilege given to the complainants as follows:

> "This is persuasive that they (the complainants) fared much better than shippers of certain other commodities who were compelled to wait their turn in the slow process of loading by the carriers' reduced force of labor."

On page 689 the Commission again called attention to the concessions and privileges granted the complainants and the value of the same, as follows:

> "For the most part, however, had the shippers insisted on their rights under the tariffs, their paper stock would have been received eventually after long delays along with other commodities and loaded by the carriers. Pursuing such a course they would not have been able to ship nearly as much as they did, and the expense incident to the delays of trucks standing in long lines, together with conveyances of other commodities for hours, waiting to unload, *would have far outweighed the expense of loading the cars by their own employees. If deprived of some portion of this transportation service extended by tariff, due to war conditions, these shippers received a consideration for such deprivation.*"*

It is impossible in view of this finding by the Commission, to conclude that there was any violation of the Act on the part of the Commission in its failure to award payment to the complainants for the loading services performed by them for the carriers, for the Commission states in plain language *that the consideration given the complainants in return for their performance of outbound loadng service, was in excess of the cost of the loading service.* In other words, the Commission finds that the complainants have received full considera-

* Italics ours.

tion for their services. What more could the Commission have done in respect of determining the reasonable charge as the maximum as required by Paragraph 13 of Section 15 of the Act, than to say that the complainants had received full consideration for their services? It said and did all it could do except prosecute the complainants and the defendants for a violation of the Interstate Commerce Act. The war conditions that prevailed, and the fact that no one had been injured doubtless led the Commission not to proceed with such a prosecution. Under a proper interpretation of the Act, or under the incorrect and illogical interpretation adopted by the District Court of Appeals, the Commission has done all it could possibly do in the premises. No court can overturn the Commission's findings of fact where they are supported by evidence. I. C. C. *v.* Ill. C. R. R. 215, U. S. 452, 470; I. C. C. *v.* Union Pacific R. R. Co., 222 U. S. 541, 547; A. T. & S. F. Co. *v.* U. S., 233 U S. 199, 222; U. S. *v.* L. & N. R. R. Co., 235 U. S. 314, 320; Manufacturers' Ry. Co. *v.* U. S., 236, U. S. 457, 481, 488. The record in this case is not before the court. No question, therefore, can arise as to the sufficiency of the evidence before the Commission. If, therefore, the Commission found, as a fact, that these complainants had been paid by the defendants in services and privileges of greater value than their services to the defendants were worth, what can the court do by sending the record back to the Commission with an order compelling it to find or fix a definite allowance for the complainants for their services? It is respectfully submitted that if the opinion of the District Court should be sustained and the Commission should be mandamused to fix a definite allowance for the complainants for their

services, all that it could do would be to find that the complainants must be allowed $2.00 or $3.00 or any definite sum per car for their loading services, and to follow the same by its findings of fact that the complainants have already received this $2.00 or $3.00 and considerably more from the defendants. In other words, the Commission *might fix the allowance to be paid the complainants,* but it has already found that this allowance has been overpaid by the defendants.

(6) Conclusions.

It is respectfully submitted that the decree of the Court of Appeals of the District of Columbia should be reversed for the following reasons:

1. The question involved is the interpretation of the power of the Commission to definitely fix allowances for services performed by shippers for carriers under Paragraph 13 of Section 15 of the Act. The decision of the Court of Appeals is based entirely upon a misinterpretation of the Diffenbaugh Case, 222 U. S. 42. This case was in reference to the power of the Commission to forbid allowances made by railroads to elevators for elevating grain, on the ground that the same were rebates. The instant case is not in reference to the same or similar subject matter, but involves the power of the Commission to fix allowances for services performed by shippers in a definite sum, rather than to determine the reasonable maximum therefor in accordance with the terms of the Act.

2. The history and the purpose of Paragraph 13 of Section 15 of the Act shows that it was passed by Congress for the purpose of giving the Commis-

sion power to fix the reasonable maximum of any allowances to shippers so that such payments could not constitute rebates, but that no power was given the Commission to fix or order definite allowances to shippers.

3. For many years the Commission has had the power to fix reasonable maximum rates, but never minimum rates until 1920. The same power was given to determine reasonable maximum allowances to shippers under Paragraph 13 of Section 15, in 1906, but never to determine the minimum. The wording of Paragraph 13 of Section 15 has been the same since the passage of the Act in 1906, although the Interstate Commerce Act has been amended by Congress many times. The Commission, therefore, has never had the power to fix definite allowances to be paid by carriers to shippers for the performance of services.

4. The Decision of the Court of Appeals of the District of Columbia to the effect that the Commission not only has power, but is compelled to award definite allowances to shippers for the performance of services is contrary to the practical interpretation of this section by the Commission for a period of over fifteen years. The Commission's interpretation during all this period is persuasive of the correctness of the same.

5. The defendant carriers published no tariffs authorizing them to pay allowances for services to the complainant shippers in this proceeding. For the Commission to order the payment of such allowances would be contrary to its own decisions for many years to the effect that allowances cannot be paid under any circumstances unless they are

covered by tariff publication, also contrary to the decision of the Supreme Court in Mitchell Coal Co. *v.* P. R. R. Co. (*supra*) in this respect.

6. There was no necessity for the District Court of Appeals to interpret Paragraph 13 of Section 15 of the Act at all, as the Commission found as a fact in its report, that the defendant carriers had overpaid the complainants for the services performed by them in loading outbound shipments to cars at New York Harbor.

The decree of the Court of Appeals should, therefore, be reversed.

All of which is respectfully submitted.

RICHARD W. BARRETT,
Attorney for Carriers.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 245.

INTERSTATE COMMERCE COMMISSION,
PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA EX REL., MEMBERS OF THE WASTE MERCHANTS' ASSOCIATION OF NEW YORK, VOLUNTARY ASSOCIATION, DEFENDANTS IN ERROR.

Brief for the Waste Merchants' Association of New York.

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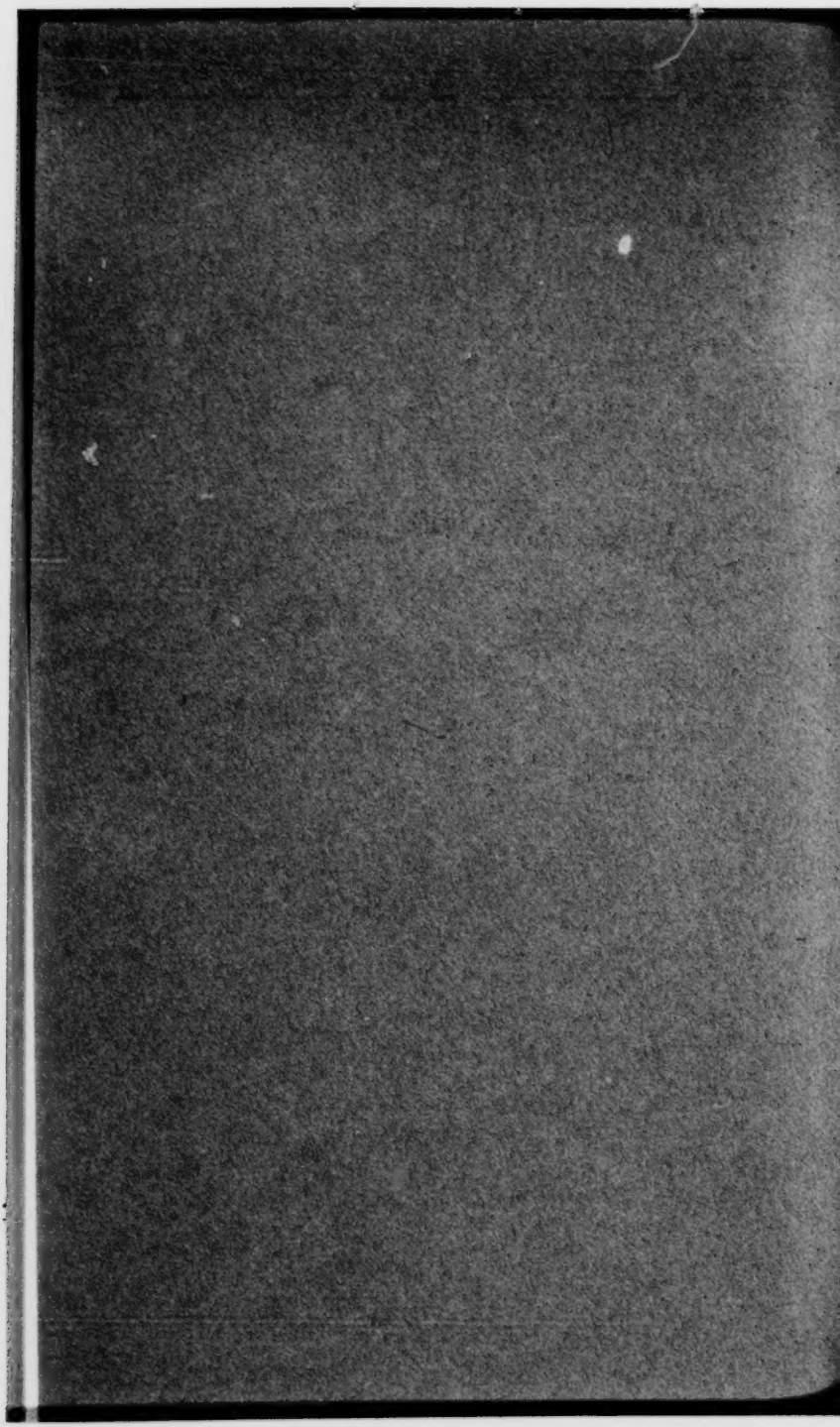

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Brief for the Waste Merchants' Association of New York.

Statement of the Case.

History.

The following facts are either matters of record in this cause, matters of which this court will take judicial notice, or have been ascertained in reported cases. *New York Harbor Case*, 47 I. C. C., 643; *Handling of Heavy Articles*, 47 I. C. C., 323; *Lighterage and Storage Regulations at New York*, 35 I. C. C., 47; *Swift & Co.* vs. *A. C. L. R. Co.*, 42 I. C. C., 83; *U. S.* vs. *B. & O. R. Co.*, 231 U. S., 285.

Plaintiff in error will be referred to herein as "the Commission," and defendants in error as "the shippers."

The port of New York is peculiar in many respects to

itself. The rail isolation of Manhattan Island and of Long Island has caused a growth of transportation methods, which are to be found nowhere else. Private sidetracks are extremely scarce and additional ones are not to be had at any price. Public team tracks are few and these few belong almost entirely to the New York Central Railroad.

There are now, and have been for many years past, nine principal rail carriers serving the port of New York. These carriers have for many years past moved the greater portion of the freight by carfloats and lighters from and to Manhattan and Brooklyn to and from their terminals on the mainland. This movement by carfloat or lighter is now, and has been for many years, a part of the through transportation service. All nine of the principal carriers serving New York, do now maintain, and have for many years past maintained, stations on Manhattan Island and in Brooklyn for the receipt and delivery of freight. The nine carriers are: Erie Railroad, Pennsylvania Railroad, Central Railroad of New Jersey, West Shore Railroad, New York Central Railroad, New York, New Haven and Hartford Railroad, Baltimore and Ohio Railroad, Delaware, Lackawanna and Western Railroad, Lehigh Valley Railroad.

Shippers deliver their freight to the carriers at these stations for shipment and the through transportation begins immediately. The shipper is not concerned about the movements of lighters and carfloats, as their movements are controlled by the tide and weather. The nine tariffs all provide as follows. The language is substantially the same in each tariff:

> "Exceptions to Rule 8-B.
>
> "At New York, N. Y., and Brooklyn, N. Y., freight in carloads other than bulky freight carried at carload rates, received or delivered at New York or Brooklyn stations, as shown in the list

of stations and agencies (Note 9), and carriers' warehouses or sheds, or over piers or platforms, will be loaded into and unloaded from cars by the carriers."

All rates to and from the port of New York are made to include the service of loading and unloading the cars or lighters at the points in Manhattan and Brooklyn, where carload freight is handled. On joint traffic the connecting carriers contribute a fixed sum per ton, to the originating or delivering carrier at New York as the case may be, as compensation for this peculiar terminal service. The Interstate Commerce Commission in prescribing rates to or from New York has always considered the terminal service as a factor of the transportation cost. Especially shipments through the carriers' stations where delivery from the shipper is completed when the freight is accepted on the floor, platform or pier operated by the carrier, because the obligation to load the cars is and was upon the carrier regardless of the actual cost, at any particular time.

Nearly all the stations designated by the tariffs are served by carfloats; that is, cars placed on floats and towed to the platform or pier. The movement of this floating equipment is irregular, on account of the varying conditions of tide and weather. The carfloats may arrive and depart at all hours of the day or night. The outbound freight is accumulated at the stations and is loaded by the carrier whenever the carfloat arrives. Inbound freight is unloaded by the carrier at the stations. Shippers take the inbound freight from the platform of the pier, not from the cars. This labor of loading freight into the cars at the designated stations is the principal question involved in this case. The second question is the issuing by the carriers of limited receipts or bills of lading for the shipments involved. This will be discussed later.

Sometime during the month of January, 1917, several months before our declaration of war and a whole year prior to federal control (Rec., p. 10, 28) the shippers of paper stock in bales in carloads were informed verbally by the carrier that labor was so scarce that the service of loading cars must be performed by the shippers' own men. The shippers were confronted with the problem of securing sufficient labor which the carriers said was not obtainable. But the shippers found that the labor could be secured, and they did employ the extra laborers necessary to perform the loading service (Rec., p. 24). The shippers made numerous verbal protests but the carriers refused to furnish the necessary labor and instead invited the shippers to bring their own laborers on the piers and carfloats to load the freight into the cars (Rec., p. 10, 19, 24, 28).

The shippers could not dump the freight upon the station platform and sue in conversion for the value of the goods because they were duty bound to mitigate the damages as far as possible by loading the bales and allowing them to be transported. The City Fire and Health Departments would not allow the shippers to accumulate large quantities of waste paper, and for this reason also the movement was continued. The carriers could not stop the movement of this paper stock during federal control, as it was listed as an essential war material and was specially exempted from the operation of al, embargoes, by the Director General of Railroads[1] acting pursuant to a proclamation of the President (See U. S. R. R. A., C. S., No. 1-A). The foregoing reasons will illustrate the extreme circumstances which compelled the shippers to perform the loading service and move their shipments. In addition to the above facts, nearly all the shippers were under contractual obligations to supply paper stock to mills engaged in the manufacture of Government supplies.

Finding their verbal protests of no avail the shippers called the matter up for discussion at a meeting of their trade association in the latter part of 1917. A committee was appointed to deal with the question. The committee upon investigation found that the tariffs remained unchanged and that the freight rates were still made to include the loading service. Whereupon a written statement of the facts and a demand for compensation was prepared and forwarded to the carriers' agents, on February 14, 1918 (Rec., pp. 10, 30). Various replys were received from the carriers' agent, some professed ignorance of the tariff provisions which required the carriers to load, some said labor was scarce, some said that the amount of compensation demanded was too high. The situation at the stations remained unchanged while the argument progressed. If the freight was to be moved the shipper must furnish the labor to load the cars. Coincident with the loading trouble, the carriers began to force shippers to accept limited receipts for their shipments. This was done by stamping on the face of the bills of lading "shippers load and count" (Rec., pp. 10, 20, 25). Checkers were asked for by the shippers to count the bales but none was provided. The shipments were all delivered to the carriers at stations where employees were maintained for the receipt and delivery of freight. But because the shippers were compelled to perform the loading service they were also compelled to accept a limited receipt for their goods, thereby relieving the carrier of its just duty to account for loss or damage in transit.

In January, 1919, the shippers again brought the situation up for discussion before their association. The committee reported no progress and it was agreed that legal proceedings should be instituted to correct the situation. Counsel was employed and on March 11, 1919, a complaint was filed with the Interstate Com-

merce Commission (Rec., p. 13). Thus this proceeding was begun to:

1. Establish a just and reasonable allowance as compensation, for the services rendered, and for future services if the situation continues, or it again becomes necessary for petitioners to perform.

2. To recover damages sustained on account of violations of law by the carriers.

3. To compel the carriers to cease and desist from the violations of law complained of.

The Hearing.

In due course the Commission took the testimony at New York before one of its examiners (Rec., p. 8).

The shippers all testified that they had actually sustained a loss which could be definitely proven, per ton of paper stock, loaded by them, and that the losses had been forced upon them on account of this loading and the "shippers load and count" bill of lading. It was testified by all of the shippers that accurate records had been kept, and were being kept, of all shipments and losses.

The carriers produced witnesses who frankly admitted that the shippers had performed the loading service since the early part of 1917. It was also admitted that "shippers load and count" had been stamped across the face of the bills of lading. The same witnesses admitted having received the written protest and demand for compensation. Each one of these witnesses testified that the carriers did not have sufficient labor to perform the service and for that reason the shippers were forced to perform it. Some attempt was made to offer the opinions of these witnesses as evidence in that each one said that petitioners had elected to load the cars, in order to secure transportation, and having elected to load and make the shipments the

petitioners performed the service for their own convenience, and were not entitled to compensation.

The carriers failed to produce, as witnesses, the receiving clerks who actually received and directed the handling of all freight at their respective stations.

No conflicts of direct first evidence developed. The facts were very well settled and little or no attempt was made to refute the allegations of the complaint (Rec., pp. 24, 25).

The Briefs and Oral Argument.

In due course briefs were filed in behalf of all parties. The carriers' counsel based his entire defense upon the contention that the carriers had in fact extended to the shippers a privilege in allowing them to enter the piers or stations and perform the loading service. And also because an implied contract, outside the tariffs, should be found and recognized between the petitioners and the carriers.

The examiner who heard the testimony offered a proposed report which would have awarded petitioners 12 cents per ton and a minimum of two ($2.00) dollars per car loaded (Rec., pp. 8, 9).

Oral argument was heard by the commission. Carriers' counsel argued at great length upon the contention that petitioners had entered into a verbal contract with the carriers, in violation of the tariffs and were merely trying to repudiate that contract.

Decision.

The Commission after several months deliberation handed down a decision which completely ignored the proposed report of the examiner and the question of damages, and after finding that the law had been violated by the carriers, and that the shippers had per-

formed the service, sets out many excuses and minor details why the carriers should be exonerated and excused. No authorities were cited to justify this peculiar view and the whole decision evidences an arbitrary exercise of power seldom seen or heard of in the United States. Respondent arbitrarily refused to determine the question of damages (Rec., pp. 9, 10, 22).

Petition For Rehearing.

In due course the shippers filed with respondent a petition for rehearing, which set out thirty-four separate and distinct grounds. Nineteen errors of fact and eleven errors of law were set out in detail. The Commission denied the petition for rehearing without a written opinion (Rec., p. 27).

Petition For Mandamus and Certiorari.

Within a reasonable time from date of the denial, by the Commission, of the petition for rehearing the shippers filed a petition in the law side of the Supreme Court of the District of Columbia, praying for mandamus and certiorari in aid thereof. The shippers asked for an order against the Commission to compel it, to take affirmative action toward the restoration of the measure of the transportation service and the charges therefor, as fixed by the tariffs lawfully filed and published, and make an award of damages (Rec., p. 1).

The Commission filed an answer substantially admitting the allegations of the petition, but denied the power and jurisdiction of the court to review its action. Whereupon the shippers filed a demurrer to the answer. The cause was argued on the demurrer (Rec., pp. 37, 40).

The court refused to hear argument concerning the errors of fact and confined counsel to errors of law.

Memorandum briefs were filed, and after some de-

liberation the court handed down a short opinion overruling the demurrer and denying the relief prayed for. The only ground stated for denying the relief was that the shippers had participated in the violations of law. The shippers could do one of two things; proceed with the taking of testimony to prove the allegations of the petition, or take the record as it stood, up for review. Whereupon the shippers appealed (Rec., pp. 42, 43).

The honorable Court of Appeals of the District of Columbia, after filing of briefs and hearing oral argument, reversed the court below and ordered the writ of mandamus to issue (Rec., p. 45). The action of the honorable Court of Appeals, is now brought here by the Interstate Commerce Commission for review upon a writ of error (Rec., p. 50).

Much attention is devoted by our adversaries to their suggestion that the testimony before the Commission is not before the court, which can not, therefore, be advised concerning the matters which influenced the Commission in denying the relief sought by the shippers. To this we reply that the conceded facts are such as to make it apparent that the shippers are entitled to relief, and further, that the record in this case shows that petitioners prayed for a writ of *certiorari* in aid of their mandamus, should the court be of the opinion that the same was necessary

The petition for mandamus alleges, in substance, that no testimony was submitted to the Commission which would justify a finding that the shippers agreed to render the loading service free, or that to do so was in any manner to their benefit or advantage, but, that on the contrary, the testimony showed conclusively that the shippers were forced by the carriers to render this service at great additional expense and without any compensatory benefit. The court below was of opinion that the facts admitted by the record were sufficient to en-

title the shippers to an award of compensation, and we earnestly contend that this decision was correct, and merely refer to the application for *certiorari* for the purpose of showing that, had the court below entertained any doubt as to the sufficiency of the undisputed facts, or considered it necessary to determine any matters involving the testimony before the Commission, it could have brought before it the entire record under the prayer for *certiorari*.

The "Bona Fides."

The learned Court of Appeals, in its opinion, has very wisely said, that every case must be decided upon the "*bona fides*" of that particular transaction. This honorable court has always followed this policy and in the case of the *Postal Telegraph & Cable Co. vs. Adams*, 155 U. S., 696, it was said that the substance and not the shadow will determine the adjudication of the case.

It is not disputed by the carriers or the Commission that the shippers have, as a matter of fact, loaded these cars at stations where the loading service was included in the through transportation. It is not disputed that the tariffs provided for this loading service by a part of the through rate. It is not disputed that the shippers incurred this additional expense of loading of cars on account of failure of carriers to fulfill their obligations, as set out by the tariff.

Although the Commission has assigned only three definite points of error, it is impossible to discuss the case intelligently without touching upon several other questions.

The original complaint before the Commission contained, in addition to other allegations, a separate and distinct paragraph which reads as follows:

XVI.

> "That complainant's members have suffered great financial damage and injury, and have

been subjected to great inconvenience and extreme harship in the course of their business, on account of the violation by defendants of their duly published tariffs and rules and regulations, and an award of reparation is due said members as liquidated damages, under Sections 8 and 9 of the act to regulate commerce."

The Commission, in its decision, utterly ignored this part of the complaint. The petition for mandamus asked, among other things, that the Commission be compelled to fix the damages. The Court of Appeals has ordered the court below to issue the writ of mandamus which, among other things, will require the Commission to fix the damages alleged in paragraph XVI of the complaint. The commission has assigned no error touching upon this action of the court and we must assume that it has now accepted the demand for damages as well founded. Certainly the shippers have suffered damage and are entitled, as a matter of rational justice, to reparation in an amount sufficient to restore them to the measure of t he service as provided by the tariffs at the rates of transportation quoted in connection therewith.

As a practical example, let us take the typical case of a small paper stock dealer who supplies a paper mill at a point X in the State of Pennsylvania, with this material. Suppose that the through rate from New York to X is $5 per ton and all the transactions between the paper stock dealer and the mill are based upon the delivery of this paper stock at the mill at this rate of freight. Then when the carriers arbitrarily, without the change of a *comma* in their tariffs, force the dealer to assume part of the transportation service and still force him to pay the through rate of $5 per ton, the cost of the loading service, for example, we say being $1 per ton, the paper stock dealer is compelled to pay a total of $6 per ton

in order to secure the through transportation of his freight, although the tariffs specifically say that the charge should be only $5. This extra $1 of cost which the shippers have been forced to incur is nothing more or less than an overcharge and should be refunded as such. The shippers have kept accurate records and are in a position to prove every single car loaded by them at the particular stations. There is no reason, justification or excuse for this failure of the carriers and the Commission to restore the transportation service as fixed by the tariffs duly filed and published according to the Act to Regulate Commerce.

The Waste Merchants Association of New York is composed of about thirty-two small paper stock dealers. Waste paper and rags constitute what is known as paper stock. Paper stock is consumed by the paper mills in the manufacture of paper. This is a process of reclaiming materials which would otherwise be destroyed or thrown away.

The Commission has found that the carriers continued to load freight for other shippers but that they refused to perform that service for the paper stock dealers. Certainly this is discrimination of the most vicious kind. It is strange that the carriers picked out the smallest and the poorest class of shippers when they decided to impose on somebody. It is strange that the carriers did not amend their tariffs so that the reduction in the measure of the transportation would apply to all shippers alike. But this was not done and as a matter of fact, the carriers picked out the shippers whom they feared the least and proceeded to impose this additional burden without any change in the published tariffs.

These shippers have not asked for an award of reparation based upon merely vague and indefinite elements of damage, such as, discrimination, undue preference or unreasonable charges. But on the contrary they are

soundly fortified by the fact that the carriers have exacted from them a thing of value over and above rates of transportation provided in the tariffs. The Commission has sought to avoid this question and an effort has been made to dispose of the entire case upon the question of whether of not it had authority to fix the allowance and to compel the carriers to publish such allowances in the tariffs.

The court will readily see that in the last paragraph of the Commission's opinion, it is found that the charges were not unreasonable or unjustly discriminatory or unduly prejudicial, but the question of whether or not they were otherwise unlawful, has been carefully avoided.

Indeed, the conclusions of the Commission fail to follow the findings of fact stated in the body of the report itself.

We, of course, must presume that the Commission took an erroneous view of the law as applicable to this state of facts, but we must also look at the situation as it is, without restraint. To approve and affirm the statements of law made by the Commission would open the door to discrimination, rebate and numerous other illegal practices. That is the real issue in this case.

Appellant's Brief.

Counsel can not pass without comment the most unusual statements made on pages 14 to 17 in the brief filed on behalf of the carriers.

The Commission seems to feel that it possesses power to excuse at will, any violator of the law. There seems to be a stubborn opinion that a rate, rule or regulation is not binding upon a carrier so long as the violations thereof are not determined by the Commission to be unjust, unreasonable and discriminatory. Certainly the shippers must not be allowed to suffer from this erroneous view of the law. The shippers were forced to pay, in substance,

an overcharge in freight. The carriers had them "in extremis."

The highly speculative comparisons which the Commission has attempted to draw, between the amount of freight shipped by these shippers and by other shippers are of course immaterial, but they are also without foundation as no other shippers were parties to this complaint and the amount shipped by others did not enter the record in any manner.

The Commission would have the court believe that more trucks and more laborers could work on a pier when paid for by the shippers than when paid for by the carriers. One moment of thought will explode this fallacy. A pier will remain the same size regardless of whose employees work on it. A carfloat will hold the same number of cars, the gangway from pier to float will accommodate just the same number of hand trucks, the bulkhead will accommodate the same number of wagons and motor trucks. The question is who shall pay the laborers who did load these cars. The tariffs require the carriers to bear this expense. The examiner or master who heard the witnesses testify recommended that the carriers reimburse the shippers. But the Commission, in the face of the tariff provisions, in the face of the recommendation of the man who saw and heard the witnesses testify and without the citation of a single authority has held that the shippers are entitled to nothing for this service, which they were compelled to perform. Even the Commission has found that the shippers were compelled to incur this extra expense on account of the failure of the carriers to perform their duty. There is no suggestion that the shippers rushed in and performed this loading service against the wishes of the carriers. These pier stations were entirely under the control of the carriers.

There is some hint that the Commission has found

the testimony to be vague and conflicting. It is respectfully submitted that the Commission is trying thus to cast a cloak of discretion around its manifest errors. However, there are only two points upon which even the Commission has intimated that the evidence was not perfectly clear.

1. The origin of this loading practice by the shippers.

2. The names of all the outbound stations in New York Harbor involved in this complaint.

A careful study of the record will dispose of the first point, of inferred conflict.

In regard to the second it is only necessary to refer to rule number III (*r*) of the Commission's Rules of Practice, as follows:

> (*r*) If a general rate adjustment is challenged in the complaint, or many shipments or points of origin and destination are involved, it is the practice of the Commission to find and determine in its report the issues as to violation of the act, injury thereby to complainant, and right to reparation, and thereafter to afford the parties opportunity to agree or make proof respecting the shipments and amount of reparation due under its finding before entering its order awarding reparation. See rule V. In such cases freight bills and other exhibits bearing on the details of shipments, and the amount of reparation on each, need not be produced at the hearing unless called for or needed to develop other pertinent facts.

It might be well to point out also in this connection that the shippers have never made any claim except for cars loaded at certain outbound stations which are specifically named in the tariffs. Thus the statement of the Commission in regard to all the outbound stations, is just about as relevant as the finding that the rates, excluding the loading service were reasonable.

The carriers violated their own rates, rules and regula-

tions and the shippers were put to additional expense as a result thereof. These violations were unlawful "*ab initio*" under section 6, but the Commission seeks to cure them by a finding of reasonableness under section 1, and non-discriminatory under sections 2 and 3 of the act to Regulate Commerce.

Opposing counsel has neglected to mention the decision of this honorable court in the case of Kansas City So. Ry. *vs.* I. C. C., supra. Likewise he has failed to mention several other decisions.

The argument advanced by the Commission under Point VI, page 24, of the opposing brief, is readily disposed of by recalling that the shippers are asking for the protection of the measure of a service which is and was fixed by the rates, rules and regulations of the carriers. The carriers violated their own rules. The expert discretion of the Commission is not required to give the relief asked. The Commission in Guyton Harrington Mule Co. *vs.* L. & N. R. R. Co., supra, granted exactly the relief here asked.

The Law.

Only three errors have been assigned, but the very nature of the case compels us to consider all the questions which are material and essential. The errors assigned follow:

First. That said Court of Appeals erred in entering judgment reversing the judgment of the Supreme Court of the District of Columbia with costs and ordering the issuance of a writ of mandamus in effect requiring appellee to fix, and to require by order certain common carriers to pay to appellent's members, compensation for services performed by the latter in loading shipments of paper stock into cars at New York Harbor points.

Second. That said Court of Appeals erred in making

findings of fact inconsistent with the findings of fact contained in the report of appellee upon which is based its order dismissing the complaint of appellant.

Third. That said Court of Appeals erred in holding that it is the duty of appellee, under paragraph (13) of section 15 of the Interstate Commerce Act, and upon the facts disclosed by the record in this case, to fix and require the payment, as aforesaid, of said compensation.

In order to determine these issues, the authorities have been grouped under the following statements. The decision of the Court of Appeals can be sustained upon the following points, and its affirmance is not dependent upon Sec. 15.

1. The Court of Appeals had ample power to review the conclusions of law announced by the Commission.

The general law is well stated in volume 26 of *Corpus Juris*, page 192:

> "Where any tribunal in which discretionary power is lodged has exercised its discretion, so far as the exercise is necessary in a particular case, and has given its conclusions upon the facts before it, what remains to be done to make its conclusions effective is purely ministerial, and mandamus will lie to compel its performance."

The same proposition is also stated in 18 Ruling Case Law, paragraph 235, as follows:

> "The lower court or judge may be compelled to act in a particular way where the facts are not in dispute, and the court has come to a wrong conclusion of law therefrom, or disregarded a duty expressly enjoined by the law under the undisputed facts.

In State *vs.* Johnson, 103 Wis., 591, the court said (Rec., p. 623):

> "When only one course is open to a court on the facts presented, the pursuance of that course

> becomes the plain and absolute duty of the court, and a refusal becomes, in effect, a failure to perform a duty within its jurisdiction.

There are at present only three similar instances where mandamus was asked for against the commission. The writ was granted in these instances upon a mandate from this Honorable Court. See *Ex rel. Humbolt Steamship Co.*, 246 U. S., 474, *Ex rel. Louisville Cement Co.*, 224 U. S., 638; *Kansas City So. Ry.* v. *I. C. C.*, 252 U. S., 178. These cases are very helpful.

For cases on the power of the courts to review, see *Lombard* v. *West Chicago Park Commissioner*, 181 U. S., 731; *Manufacturers R. R. Co.* v. *U. S.*, 246 U. S., 457; *U. S.* v. *Lamont*, 155 U. S., 303; *I. C. C.* v. *Ill. Cent. R. Co.*, 215 U. S., 450; *L & N. R. Co.* v. *Behlmer*, 175 U. S., 676; *I. C. C.* v. *C. B. & Q. R. Co.*, 186 U. S., 218; *T. & P. Ry. Co.* v. *I. C. C.*, 162 U. S., 199; *I. C. C.* v. *L. & N. R.*, 227 U. S., 88.

From the foregoing decisions it will be readily seen that the courts have always exercised the power to review pure questions of law, arbitrary action, or abuse of power. In the case at bar all the material facts are undisputed. The Commission has found the violations of law, the performance of the service by the shippers and the issuance of "shippers load and count" bills of lading. The only thing which remains to be done, is to find the incidental facts and issue the order necessary to restore the shippers to the measure of the service as prescribed by law and damages.

In the case of *I. C. C.* v. *L. & N. R.*, supra, the Supreme Court in criticizing the commission said:

> 1. "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is ar-

bitrary and baseless. And if the Government's contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that, where rights depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (*Tang Tun* v. *Edsell*, 223 U. S., 681, 56 L. Ed., 610, 32 Sup. Ct. Rep., 359; *Chin Yow* v. *United States*, 208 U. S., 13, 52 L. Ed., 370, 28 Sup. Ct. Rep., 201; *Low Wah Suey* v. *Backus*, 225 U. S., 468, 56 L. Ed., 1167, 32 Sup. Ct. Rep., 734; *Zakonaite* v. *Wolf*, 226 U. S., 272, ante, 218, 33 Sup. Ct. Rep., 31), or if the facts found do not, as a matter of law, support the order made (*United States* v. *Baltimore & O. S. W. R. Co.*, 226 U. S., 14 ante, 104, 33 Sup. Ct. Rep., 5; *Cf. Atlantic Coast Line R. Co.* v. *North Carolina Corp. Commission*, 206 U. S., 20, 51 L. Ed., 942, 27 Sup. Ct. Rep., 585; *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S., 301, 45 L. Ed., 201, 21 Sup. Ct. Rep., 115; Washington ex rel. *Oregon R. & Nav. Co.* v. *Fairchild*, 224 U. S., 510, 56 L. Ed., 863, 32 Sup. Ct. Rep., 535; *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S., 470, 54 L. Ed., 237, 30 Sup. Ct. Rep., 155; *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U. S., 433, 55 L. Ed., 283, 31 Sup. Ct. Rep., 288; *Muser* v. *Magone*, 155 U. S., 247, 39 L. Ed., 137, 15 Sup. Ct. Rep., 77)."

Particular attention is called to the statement "or if the facts found do not, as a matter of law, support the order made."

This honorable court has recently reviewed these authorities in "Kansas City So. Ry. *vs.* I. C. C.", *252 U. S., 178.* The proper remedy is mandamus, and the Court of Appeals committed no error in so deciding.

The fixing of the damages does not require the exercise of any expert knowledge or discretion. This honorable court in the case of Great Northern Railway Co. *vs.* Merchant's Elevator Co., decided May 29, 1922, said that, even the construction of a tariff provision did not require the exclusive expert discretion of the Commission.

2. A Contract Outside, and Contrary to, the Tariff Provisions is Null, Void and Can Not Be Recognized.

The Commission lays great stress upon an agreement "tacit or implied" between the shippers and the carriers, to modify the tariff provisions. The Commissions' finding of such an agreement is without supporting evidence, but for the sake of the legal questions involved, only the law will be discussed here.

Section 6, of the Act to Regulate Commerce, provides that:

> "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which

> are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property; except such as are specified in such tariffs; provided, that, wherever the word 'carrier' occurs in this act it shall be held to mean 'common carrier.' "

In the early days of the regulation of interstate carriers, this identical question was definitely decided in the case of *A. J. Poor Grain Co.* v. *C. B. & Q. Ry. Co.*, 12 I. C. C., 418, and *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 442, *Armour Packing Co.* v. *United States*, 209 U. S., 56, *A. T. and S. F. Ry. Co.* v. *Robinson*, 233 U. S., 173. The foregoing decisions all hold that the rates, rules and regulations published in the tariffs are imposed not by the carrier but by the law and no extraneous agreement can be recognized.

Thus the findings of the Commission are contrary to the statute and ruling decisions.

3. Defendants in Error, the Shippers, Were and Are, As a Matter of Law Entitled to the Relief Asked For.

The law on the subject of mandamus is too well settled to require argument. Petitioners, in order to proceed by mandamus must have a legal right to the relief wrongfully withheld.

Sections 8 and 9 of the Act to Regulate Commerce, make the carriers liable for all damages, which may flow from violations of the other sections. Section 15 of the Act to Regulate Commerce requires the Commission to stop violations, and to fix allowances to shippers. Section 16 provides for the award of damages. Section

10 of the Federal Control Act does not alter the law. Sections 20 and 21 of the Bills of Lading Act provide for the issuance of clear receipts. In the case at bar respondent has found that the law was violated, and that petitioners were as a direct result thereof compelled to incur expense in addition to the published rates. This finding reads:

> "It is obvious, as pointed out above, that the carriers did not fulfill their complete obligation under the tariffs during the prevalence of war conditions, and as a consequence the shippers were compelled to incur the expense of loading by means of their own employees."

Other findings similar to the above will be found in respondent's report.

In Southern Pacific Railway Co. et al. *vs.* Darnell-Taenzer Lumber Co., 245 U. S., 531, the court held that one who has paid unlawful freight charges may recover the overpayment from the carrier, although the shipper has collected the unreasonable charges from the consignee. This case held that the plaintiff was damaged when the illegal charges were paid, and that a claim for reparation accrued immediately upon payment, that the carrier ought not to be allowed to retain his illegal profit, and that the only one who could take it from him was the one from whom the carrier collected the overpayment.

In Spiller *vs.* A. T. & S. F. R. Co., 253 U. S., 117, the court held that payment of a published rate, afterwards decided to have been excessive, is evidence that the party who paid the freight sustained damage to the extent of the excess. It should be noted, that, in the case at bar, appellants paid *more* than the published rate, and this was found as a fact by the Commission.

In discussing the right of a shipper to damages for a violation of the act, the court has held very positively

that, an award is bound to be made, as a matter of law. *Pennsylvania Railroad Co.* v. *International Coal Mining Co.*, 230 U. S., 184; *Meeker* v. *Lehigh Valley Railroad Co.*, 242 U. S., 187; *Ill. Cent. R. Co.* v. *Perry*, 242 U. S., 292; *P. R. R. Co.* v. *Puritan*, 237 U. S., 121.

The allowance question has been settled.

Section 15 of the act provides:

> "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable and the commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished and fix the same by appropriate order." . . .

The Commission in disposing of this section merely says:

> "This provision is intended merely to provide against excessive allowances."

The Commission has ignored the decisions of this honorable court squarely on this point. In several cases the exact question was an issue:

> *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S., 42.
>
> "The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the Act of Congress in terms contemplates that if the carrier receives service from an owner of property transported, or uses instrumentalities furnished by the latter he shall pay for them. That is taken for granted in section 15; the only restriction being that he shall pay no more than is

> reasonable, and the only permissive element being that the commission may determine the maximum in case there is complaint."

Also in *Union Pacific Railroad Co.* v. *Updike Grain Co.*, 222 U. S., 215:

> "This relieved the carrier of the expense of building similar structures and avoided the delay of having the grain transferred from one car to another by the slow process of shovelling. When the service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or some other person hired for the same purpose."

Manifestly, the ruling of the Court of Appeals in the case at bar, is well founded.

The Commission has found in its report:

> "Nothing in the act requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience."

The shippers were compelled to perform the loading service here involved and respondent has so found. But in order to give the court a complete statement of the law, attention is called to *U. S.* v. *B. & O. R. Co.*, 231 U. S., 285. In this decision the court held that convenience of the shipper made no difference, the controlling fact being the obligation of the carrier to perform the service.

In considering the question of exercise of discretion in awarding reparation, the Interstate Commerce Commission said in *Western Pacific R. R. Co.* v. *S. P. Co.*, 55 I. C. C., 82:

> "If the damage alleged is directly due to a violation of the act, the award follows as a matter of course."

The Commission has followed the above rule in Foster Lumber Co. *vs.* Dir. Gen. as Agent, 63, I. C. C., 139, and Chamber of Commerce of Selma, Ala. *vs.* Dir. Gen., as Agent, 63 I. C. C., 157.

In the case at bar the Commission found as a fact that complainants "were compelled to incur the expense of loading by means of their own employees."

In deciding a case almost a parallel of the case at bar, the Commission in *Guyton & Harrington Mule Co.* v. *L. & N. R. R. Co.*, 50 I. C. C., 550, said:

> "By section 1 of the act all terminal facilities of every kind used or necessary in the transportation or delivery of property, moving as defined therein, are included in the term 'railroad' as used in the act. By section 6 carriers subject to the act are required to file with the commission schedules showing 'all terminal charges . . . all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value service rendered to the . . . shipper or consignee.'
>
> "The receipt and delivery of live stock, moving as defined in the act, at the old stockyards at Seventeenth Avenue north and railroad were privileges and facilities shown in the tariffs of the defendants until September 15, 1916. The denial of these facilities between March 21, 1916, and September 15, 1916, was a rule, regulation or practice in contravention of defendants' tariff provisions which did change or affect the value of the service rendered to complainant as shipper and consignee; because of this denial certain carloads of mules moving in interstate commerce were driven between the new and old stockyards by complainant at costs which it paid and bore in addition to the published freight rates. We have hitherto recognized that where injustice, and hardship to innocent shippers results from unrea-

sonable acts, misconduct, or default in failure to make proper delivery of shipments, the shipper is entitled to recover from the carrier at fault damages in the sum of the actual or fixed, but not more than the reasonable costs of making such delivery.

"Upon the facts and circumstances shown of record, we find that during the period from March 21, 1916, to September 15, 1916, certain mules shipped in carload lots in interstate commerce were, as a result of defendants' wrongful acts driven between the new stockyards and complainants barns by complainant at costs which complainant paid and bore in addition to the transportation charges, and that complainant is entitled to reparation in an amount equal to the sum of such additional costs."

Sections 20 of the Act to Regulate Commerce and 20 and 21 of the Bills of Lading Act, require that an unqualified receipt be given for freight, delivered at carriers' public stations.

The Commision is the only tribunal which has passed upon this question directly. In this decision no doubt was expressed.

Louisiana State Rice Milling Co. v. *Morgan's Louisiana & Texas Railroad & Steamship Company* et al., 34 I. C. C., 512:

"In answer to this contention the defendants state that in each of the cities or towns where complainant's mills are located they have provided public facilities, consisting of freight depots and team tracks, at which they maintain the necessary force of employees to check shipments as loaded without notation of the statement, 'shippers load and count,' and assume responsibility therefor. They assert that not being required to establish or operate industry tracks, which are constructed primiarly in the interest and for the convenience of the owning industry, prompted by various considerations such as the

cost of land, availability of sources of supply, including raw materials, saving in cartage, etc., carriers are within their lawful rights in attaching reasonable conditions or qualifications to receipts issued for shipments which are loaded by a shipper at the industry."

Page 513 of the same case:

"It does not appear that this rule operates to limit the liability of the carrier for the full value of the property shipped, but in its application to a claim for loss because of alleged failure to deliver the whole amount transported has the effect of placing the burden upon the shipper who loads on his private side-track to prove that the amount specified was loaded and that a less amount was taken out of the car by the consignee; whereas, in the case of a receipt not so qualified the burden is upon the carrier to prove that the amount specified in the bill of lading was either not in fact loaded, or was delivered, or otherwise to settle for the full value thereof."

Page 515 of the same case:

"It should be borne in mind that the shipper is not denied his right to an unqualified receipt in any case in which delivery is tendered to the carrier at any of its public stations where it provides facilities for the receipt and delivery of freight."

The Commission in another decision has expressed the law very aptly. Investigation and Suspension Docket No. 513. *Rates to or from certain points in the Chicago Switching District*, 34 I. C. C., 242:

"The law has been clearly laid down in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *United States* v. *B. & O. Southwestern Ry.*, 226 U. S., 14; *United States* v. *B. & O. R. R.*, 225 U. S., 306, 231; U. S., 274, and the Tap Line cases, 234 U. S., 1, and it is our duty to

loyally accept and follow the principles so established.

"For each rate, a carrier offers and obligates itself to perform a certain amount of service. If the service so offered and for a long time performed in consideration of that rate includes taking the property transported from a given point and delivering it at a given point, the delivery at that point is in no sense a 'free service.' The carrier may increase the rate or it may curtail the service performed for that rate, but if such action is challenged it must bear the burden of showing the new rate or service is reasonable and free from unjust discrimination."

In dealing with a situation similar to the case at bar the Commission awarded reparation.

Swift & Company v. *Atlantic Coast Line Railroad Company et al.*, 42 I. C. C., 83:

"We are of the opinion and find that under the tariff rule in effect at the time the shipments in question moved, the complainant was entitled to an allowance of 12 cents per ton, subject to a minimum of $2 per car, on all fresh meats in bulk loaded by it into cars on floats at the port of New York. Defendants will be expected to make prompt settlement accordingly."

Certainly the shippers have a clear legal right to the relief prayed for.

4. The Commission Has no Power to Make an Order Which is not Supported by the Facts Found, and Which in Substance Gives to the Facts of Record an Erroneous Legal Effect.

The Commission has found that the shippers entered into an agreement with the carriers to load the cars, but

were paid for the loading service by allowing them to ship at all:

> "If deprived of some portion of this transportation service extended by tariff, due to war conditions, these shippers received a consideration for such deprivation."

But the court in L. & N. R. R. Co. *vs.* Motely, 219 U. S., 467 held squarely that the shipper can pay only money to the carrier, and the carrier must furnish only the service so paid for. It was further held that the carrier can not pay its debts with transportation. The suggestion of allowing the carriers to barter and sell the right of a shipper to ship his goods over a common carrier is too repugnant to require argument.

The principal contention advanced in the brief filed on behalf of the carriers amounts to this: that the carriers granted to the shippers a special privilege, consisting of the right to drive directly upon the piers and to load the cars themselves, which enabled the shippers to move their product without loss of time, and incidental loss of money. Counsel for the carriers contends that this special privilege was of greater financial value to the shippers than the sums expended by them in performing the loading service imposed by law upon the carriers, and that for this reason the Commission properly decided that the shippers were entitled to nothing, having already been over-paid.

It seems to us that the statement of this proposition carries with it its own refutation. Surely it is too plain to require argument that a carrier may not indirectly grant a rebate by allowing to a shipper special privileges of great value, and then have this practice perpetuated and to all intents and purposes approved by a determination of the Commission holding that such unlawful arrangements and practices are not to be dis-

turbed. A contrary doctrine is destructive of the whole policy of the law governing rebates, and guarantees protection in evading the law by resort to methods which readily suggest themselves to those who would profit by such practices; but we can not believe that a carrier can be permitted to circumvent the law by such an absurdly patent subterfuge.

The Commission has found that the shippers were not unduly or unlawfully prejudiced in the issuance of limited receipts for freight. Such finding was contrary to the law. The court in Chicago & Alton Railway Co. *vs.* U. S., 212 U. S., 563, affirmed an opinion which holds that all shippers must be treated alike, under substantially similar circumstances.

The Commission is Legally Bound to Enforce the Law, And Grant the Relief.

Section 12 of the Act to Regulate Commerce provides:

> "And the commission is hereby authorized and required to execute and enforce the provisions of this act."

In the case at bar the shippers not only attacked the reasonableness or lawfulness otherwise of the tariffs but also demanded damages and compensation for violations thereof by the carriers. In an early decision the court decided that the commission was charged with the duty of enforcing the law. *I. C. C.* v. *C. N. O. & T. P. Ry. Co.*, 167 U. S., 479. The tariffs in effect are the law and the measure of the service and the charges therefor must be enforced. There are instances where the Commission may exercise discretion, but it must always enforce the law. The granting of relief on this original complaint was and is a ministerial duty, to enforce the law and effect restitution. The Commission can not

exercise its discretion where there is an undisputed violation of law; it must proceed to determine and order the relief.

P. R. R. Co. v. *Stineman Coal Mining Co.*, 242 U. S., 298.

P. R. R. Co. v. *Puritan*, 237 U. S., 121.

Mitchell Coal & Coke Co. v. *P. R. R. Co.*, 230 U. S., 255.

A. J. Phillips Co. v. *Grand Trunk Ry. Co.*, 236 U. S., 662.

I. C. C. v. *C. N. O. & T. P. R. Co.*, 167 U. S., 475.

I. C. C. v. *Ill. Cent. R. Co.*, 215 U. S., 450.

The Commission has ignored the many protests, both oral and written of petitioners, and has confused several questions of law. The question of the right to furnish service is very different from the question of paying for what the shipper is allowed to perform.

Armour & Co. v. *E. P. & S. W. Co.*, 52 I. C. C., 245.

A. T. C. R. Ry. Co. v. *U. S.*, 232 U. S., 199.

The Commission has arbitrarily refused to determine the question of damages and no mention is made of petitioners' prayer for that relief.

The arbitrary refusal of the Commission to effect restitution operates to compel the shippers to pay more than the lawfully published rates in order to procure transportation, and therefore deprives them of property without due process of law. All of which notwithstanding your petitioners' clear legal right, there is no means or method provided by statute to obtain judicial review hereof except by mandamus and certiorari. The method and machinery provided by Congress in the so-called Commerce Court Act does not extend to negative orders.

Therefore your petitioners are without remedy save in this honorable court.

See Proctor & Gamble v. *U. S.*, 225 U. S., 282.

The decision of the Court of Appeals as a matter of law, should be affirmed.

Respectfully submitted.

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Of Counsel.

No. 245

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

INTERSTATE COMMERCE COMMISSION, PLAINTIFF IN ERROR,

v.

UNITED STATES OF AMERICA EX REL. MEMBERS OF THE WASTE MERCHANTS ASSOCIATION OF NEW YORK, A VOLUNTARY ASSOCIATION, DEFENDANT IN ERROR.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Plaintiff in Error.

OCTOBER, 1922.

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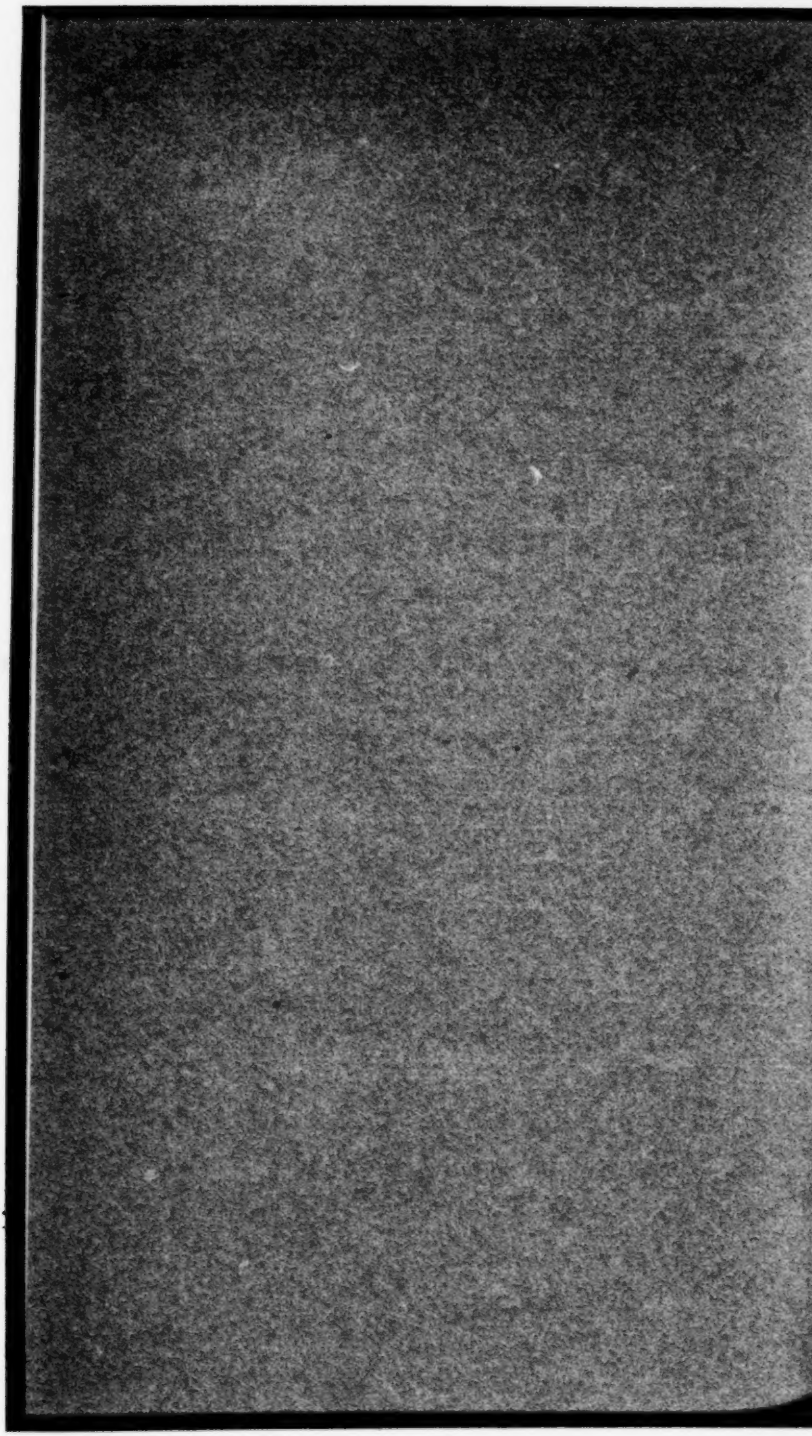

SUBJECT INDEX.

TABLE OF CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

INTERSTATE COMMERCE COMMISSION, plaintiff in error,
v.
UNITED STATES OF AMERICA EX REL. Members of the Waste Merchants Association of New York, a Voluntary Association, defendant in error. } No. 245

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is a writ of error to the Court of Appeals of the District of Columbia, bringing to this court for review the judgment of the Court of Appeals reversing the judgment of the Supreme Court of the District discharging the rule to show cause and dismissing the petition, in a case instituted in the latter court to obtain a writ of mandamus requiring the Interstate Commerce Commission, plaintiff in error, hereinafter called the Commission, to make an order awarding reparation to defendant in error's members for certain services, and to prescribe the allowances to be paid for like services in the future by

certain common carriers. In the Supreme Court of the District a demurrer to the answer of the Commission, filed by the defendant in error, was overruled; whereupon, defendant in error elected to and did stand upon its demurrer. The case is therefore before this court upon the petition, the answer, and the demurrer to the answer. Certain allegations of the petition are admitted in the answer, and the allegations of fact contained in the answer are admitted by the demurrer. It will thus be seen that there is not, and can not be, any dispute about the facts presented to the court for consideration.

The report and order of the Commission, complained of by the defendant in error, are a part of the answer, and in Paragraph V of the latter it is alleged that the facts and circumstances pertaining to each of and all the matters and things covered by Paragraph V of the petition are fully and truthfully set forth in said report.

The basis of the complaint to which the report relates is the fact that, during a certain period of time, defendant in error's members, as shippers, loaded onto cars at New York Harbor certain carload shipments which were transported by the carriers complained of. In stating the pertinent facts and its conclusions based upon the facts, the Commission, in the report mentioned, said:

> To the general rule that shippers must load carload freight, the carriers serving New York Harbor points publish exceptions which are substantially the same as the following:

EXCEPTIONS TO RULE 8-B.

(Pennsylvania Railroad Company's exceptions to Official Classification No. 44, I. C. C. 7230.)

At New York, N. Y., and Brooklyn, N. Y., freight in carloads, other than bulky freight carried at carload rates, received or delivered at New York or Brooklyn stations, as shown in the list of stations and agencies (note 9), and carrier's warehouses or sheds or over piers or platforms, will be loaded into and unloaded from cars by the carriers.

The exceptions at New York Harbor have been brought to pass by conditioning circumstances at that port. Outbound freight is loaded from piers or pier stations into cars standing on floats alongside of piers instead of from trucks into cars on team tracks. Shippers at New York are required to bring their freight to carriers' pier stations and there to unload it to the bulkhead, or in instances to take their trucks onto the pier and unload the freight at some point opposite the location of the empty cars standing on floats to receive the freight.

The complainant contends that the defendants refused to perform the obligations assumed by the tariff exceptions cited above, in that they did not load paper stock of complainant's members into cars for the outbound movement during the period covered by the complaint. It is undisputed that the defendants did not load a large part of complainant's members' paper stock into cars during this period, contrary to their tariff undertaking and that the employees of these shippers actually performed the loading serv-

ice. What were the circumstances which led the carriers to depart from their tariffs and former practice in this respect?

In April, 1917, the United States entered the World War, and one of the results was a congestion of traffic, accompanied by a labor shortage, particularly experienced by the carriers at their terminals in New York. The Central Railroad of New Jersey embargoed the shipment of paper stock. At the New York Central, Pier 34, all westbound freight was embargoed, except in carload lots when loaded by the shippers. The Lehigh Valley Railroad and the Lackawanna Railroad embargoed paper stock. Shippers of paper stock along with nearly all other shippers in New York and Brooklyn carried their freight in trucks to railroad piers and pier stations. When these trucks of paper stock took their places in long lines of vehicles containing various commodities waiting for a chance to be unloaded at the piers, great delays ensued and the trucking became exceedingly expensive. These delays were largely due to labor shortage. Either the carriers or the shippers suggested that the movement of paper stock would be facilitated if the shippers were willing to load their paper stock into empty cars for outbound movement. The evidence is somewhat conflicting as to the orgin of this suggestion. However, from the evidence as a whole, there is little doubt but that an agreement, tacit or expressed, was arrived at between the carriers and shippers of paper stock by which the latter undertook to do their own loading of the cars if they were per-

mitted to drive their trucks onto the piers of the former with but short periods of waiting. The complainant's members thus were enabled to withdraw their trucks from the long lines of vehicles containing miscellaneous commodities and to form lines consisting exclusively of trucks of paper stock.

That such a mutual arrangement was for the benefit of both parties under the extraordinary conditions of war times can not be questioned. Paper stock is a low-grade commodity which ordinarily moves in large quantities and the record indicates that during the period of congestion these shippers were able to forward between 40,000 and 80,000 carloads of paper stock. This is persuasive that they fared much better than shippers of certain other commodities who were compelled to wait their turn in the slow process of loading by the carriers' reduced force of labor.

By no means all of the outbound pier stations in the vicinity of New York Harbor were referred to in the testimony, which is indefinite in character and in details conflicting.

Unjust discrimination against complainant's members or undue preference of other commodities has not been satisfactorily established. However, it appears that whereas these shippers were not provided with freight checkers or tallymen by the carriers and therefore were given bills of lading marked "Shippers load and count," shippers of hides and leather who also loaded cars on the floats at the piers were provided with freight check-

ers and given "clean" bills of lading. On the other hand the carriers would not allow shippers of spelter and other valuable metals even to load. Such shipments the carriers loaded and tallied for their own protection and for them issued "clean" bills of lading. This was discrimination, but it was not unjust; preference, but not undue; and no damage to complainant's members was shown to have arisen by reason of marking the bills of lading of paper stock, "Shippers load and count," other than delays in the settlement of claims.

It is obvious, as pointed out above, that the carriers did not fulfill their complete obligation under the tariffs during the prevalence of war conditions, and as a consequence the the shippers were compelled to incur the expense of loading by means of their own employees. For the most part, however, had the shippers insisted on their rights under the tariffs, their paper stock would have been received eventually after long delays along with other commodities and loaded by the carriers. Pursuing such a course they would not have been able to ship nearly as much as they did, and the expense incident to the delays of trucks standing in long lines together with conveyances of other commodities for hours waiting to unload would have far outweighed the expense of loading the cars by their own employees. If deprived of some portion of this transportation service extended by tariff, due to war conditions, these shippers received a consideration for such deprivation. The very undertaking by the carriers in their tariffs

to load carload shipments, as pointed out, is an exception to the general practice in favor of the shippers at New York. There is no evidence to indicate that the rates or the charges paid on complainant's shipments were excessive for the total transportation service actually rendered to them by the carriers, excluding loading.

For any failure to observe their published tariffs the carriers may be answerable in another process. There was no alternate clause in defendants' tariffs providing for the payment of an allowance if the shipper performed the loading service and hence since all allowances to a shipper must be published in the tariffs, even if defendants desired, they could not lawfully have compensated complainant's members for the loading service rendered by them. Nothing in the act requires that a shipper must be reimbursed for transportation service that he may elect to perform primarily for his own convenience. Section 15 says:

"If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than just and reasonable, and the Commission may after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished."

> This provision is intended merely to provide against excessive allowances.
>
> We are of opinion and find that the rates and transportation charges assessed on the shipments of paper stock of complainant's members during the period covered by the complaint were not unreasonable, unjustly discriminatory, or unduly prejudicial in violation of the act to regulate commerce, or unreasonable in violation of section 10 of the Federal control act for the transportation service actually rendered by the carriers; that, under the circumstances, there was no obligation on the part of the carriers to make an allowance to complainant's members for the loading service. The complaint will be dismissed. (Rec. 23–26.)

The body of the order dismissing the complaint reads:

> This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:
>
> *It is ordered*, That the complaint in this proceeding be, and it is hereby, dismissed. (Rec. 26–27.)

Subsequently, defendant in error filed a petition for rehearing and reargument which was denied by the Commission.

In overruling the demurrer of defendant in error, the Supreme Court of the District said:

> The insurmountable objection to granting any relief to the relators is that they participated to their advantage in the transactions of which they now complain. They seek to have that advantage ignored and only the burden to them considered. If there was any violation of the law they participated in it.
>
> The demurrer is overruled. (Rec. 42.)

Errors assigned by the Commission are as follows:

> First. That said Court of Appeals erred in entering judgment reversing the judgment of the Supreme Court of the District of Columbia with costs and ordering the issuance of a writ of mandamus in effect requiring appellee [plaintiff in error] to fix, and to require by order certain common carriers to pay to appellant's [defendant in error's] members, compensation for services performed by the latter in loading shipments of paper stock into cars at New York Harbor points.
>
> Second. That said Court of Appeals erred in making findings of fact inconsistent with the findings of fact contained in the report of appellee [plaintiff in error] upon which is based its order dismissing the complaint of appellant [defendant in error].
>
> Third. That said Court of Appeals erred in holding that it is the duty of appellee [plaintiff in error], under paragraph (13) of section 15 of the interstate commerce act, and upon the facts disclosed by the record in this case, to fix and require the payment, as aforesaid, of said compensation. (Rec. 51–52.)

ARGUMENT.

I.

The Court of Appeals erred in making findings of fact inconsistent with the findings of fact contained in the report of the Commission upon which is based the Commission's order dismissing the complaint of defendant in error.

By their demurrer to the Commission's answer counsel for defendant in error have admitted to be true the allegations of fact contained in the answer, and paragraph V of the latter, wherein the Commission is referred to as the "respondent," reads:

> Answering paragraph V of the petition, respondent alleges that for the reasons hereinbefore stated, namely, that neither Exhibit "A," nor Exhibit "B," nor Exhibit "C," mentioned, is attached to the copy of the petition served upon respondent, respondent has no information concerning the contents of said exhibits, or any of them, and therefore neither admits nor denies that the exhibits contain the matters and things mentioned in said paragraph V. In this connection, however, respondent alleges that in the report filed by it as aforesaid, and which is hereby made a part hereof, the facts and circumstances pertaining to each of and all the matters and things covered by said paragraph V are fully and truthfully set forth and respondent denies each of and all the allegations contained in said paragraph V to the extent that they conflict with the allegations or any of the allegations contained in this answer or with the statements or conclusions or any of the state-

> ments or conclusions contained in the report filed by respondent as aforesaid. Respondent specifically denies that, either in making, or entering, or filing said report it arbitrarily or otherwise ignored illegal practices, or any illegal practice, or arbitrarily or without warrant or otherwise ignored certain matters of evidence, or any matter of evidence, which appear or appears in the record mentioned in said paragraph V. (Rec. 39.)

Notwithstanding these matters, however, the majority opinion of the Court of Appeals contains statements of fact which are additions to and, in our opinion, inconsistent with the facts stated by the Commission in said report. The first statement of the Court of Appeals to which we wish to refer is:

> * * * In the early part of 1917 shippers of paper stock from New York were informed by the carriers that labor was so scarce and difficult to obtain that the service of loading cars must be performed by the shippers, * * *. (Rec. 45.)

The language of the Commission, as above shown, was:

> The complainant contends that the defendants refused to perform the obligations assumed by the tariff exceptions cited above, in that they did not load paper stock of complainant's members into cars for the outbound movement during the period covered by the complaint. * * *
>
> * * * Either the carriers or the shippers suggested that the movement of paper stock

> would be facilitated if the shippers were willing to load their paper stock into empty cars for outbound movement. The evidence is somewhat conflicting as to the origin of this suggestion. However, from the evidence as a whole, there is little doubt that an agreement, tacit or expressed, was arrived at between the carriers and shippers of paper stock by which the latter undertook to do their own loading of the cars if they were permitted to drive their trucks onto the piers of the former with but short periods of waiting. (Rec. 24.)

After making the statements above set forth, the Court of Appeals said:

> * * * and thereafter this service was performed by appellant as to freight shipped by it from that point, to the extent of many thousand carloads. A controversy having arisen as to compensation for the performance of this service by the shippers, a complaint was filed by them with the appellee Commission. An examiner was appointed and the undisputed evidence adduced was to the effect above indicated. (Rec. 45.)

It will be observed that the Court of Appeals referred to evidence as "undisputed" which the Commission said was "conflicting."

In referring to findings of the Commission, the Court of Appeals said:

> * * * A hearing before the Commission resulted in a report on June 1, 1920, the Commission holding that the variance from the practice of the tariff undertakings was as

> much in the interest of the shippers as of the carriers; that the rates collected were not unreasonable, unjustly discriminatory, or unduly prejudicial for the transportation service rendered, although, in reviewing the evidence, the Commission found: "There is no evidence to indicate that the rates or the charges paid on complainant's shipments were excessive for the total transportation service actually rendered to them by the carriers, excluding loading." (Rec. 45.)

We are in doubt as to why the court called attention to the sentence in the Commission's report last above quoted, because the meaning the Commission intended to convey is made entirely plain by the last paragraph of said report, which reads:

> We are of opinion and find that the rates and transportation charges assessed on the shipments of paper stock of complainant's members during the period covered by the complaint were not unreasonable, unjustly discriminatory, or unduly prejudicial in violation of the act to regulate commerce, or unreasonable in violation of section 10 of the federal control act for the transportation service actually rendered by the carriers; that, under the circumstances, there was no obligation on the part of the carriers to make an allowance to complainant's members for the loading service. The complaint will be dismissed. (Rec. 26.)

It will be seen that the Commission was of opinion, and found, that the charges paid by defendant in error's members to the carriers for transportation

services actually performed by the latter, notwithstanding that such services did not include the loading mentioned, were no more than reasonable.

The Court of Appeals also said:

> Ordinarily shippers are required to load carload freight, but carriers serving New York Harbor points, owing to conditions peculiar to that locality, have undertaken this work and a charge therefor is included in their published tariff rates. (Rec. 45.)

The conclusion that a charge for the loading is included in the carriers' tariff rates is perhaps a fair inference from the Commission's finding that applicable tariffs provide that the loading services shall be performed at New York and Brooklyn by the carriers (Rec. 23–24), but there is nothing in the record to show that the rates exacted for transportation from those points, distances considered, are relatively greater than from points where, according to the carrier's tariffs, the loading must be done by the shippers.

We are inclined to think the Court of Appeals was misled by statements of fact contained in the brief of counsel for defendant in error, which were in addition to and in conflict with the record made by the demurrer to the Commission's answer. In this connection, however, in calling attention in our brief in that court to such additional and conflicting statements, we said:

> Since this case is before the court upon a demurrer to the Commission's answer it is

apparent that the only facts presented to the court for consideration are those in the answer, and those in the petition which are admitted by the answer to be true. Under these circumstances we are unable to understand why counsel for appellant should include in the statement in their brief many other facts, some of which are in conflict with those stated by the Commission in its report and above set forth. For example, on page 3 of their brief counsel say:

"At points within the lighterage limits the tariffs provide for an allowance as follows:

"Where consignors or consignees load or unload the cars an allowance of 12 cents per ton with a minimum of $2 per car may be made for such loading or unloading, except on dressed meats, not boxed or crated, and bananas in carloads, consignors or consignees will be required to load or unload from cars and an allowance of 12 cents per ton, subject to minimum of $2 per car, will be made.

"ALLOWANCE FOR LOADING OR UNLOADING LIGHTERS, BARGES OF [OR] CARS ON FLOATS.

"An allowance for actual cost not to exceed 12 cents per ton of 2,000 pounds or 2,240 pounds as rated may be made to consignor or consignee within lighterage limits for loading or unloading lighterage free freight to or from this company's lighters or barges when such service is performed by consignors or consignees. Shippers or consignors or consignees at points beyond the free lighterage limits must when required furnish all labor necessary

to load or unload lighters or barges or cars on floats, for which service allowance of 12 cents per ton of 2,000 pounds or 2,240 pounds, as the case may be, subject to a minimum of $2.00 per car, will be made." (Id. 3–4.)

While in this connection the Commission as above shown said: "There was no alternative clause in defendant's tariffs providing for the payment of an allowance if the shipper performed the loading service * * *." (Rec. 26.)

That the facts, so far as they pertain to the matters under consideration here, are as stated by the Commission in its answer is, of course, a matter beyond controversy, and under these circumstances we are wholly unable to understand why counsel for appellant have made statements of fact, in conflict with those reported by the Commission as aforesaid, and have also included in their brief many other statements of fact which can have no possible bearing upon the matters in controversy in this case.

This is a matter to which we think best to call the attention of the court at the beginning of our argument, because we do not understand it would be proper for us to discuss matters which have not been submitted to the court for determination, upon statements of fact which are not before the court for consideration.

It will be observed that the statements of the Court of Appeals above set forth, with the possible exception of the court's statement that the charge for un-

loading is included in the tariff rates published by the carriers, are not supported by any allegations contained in the petition which are admitted by the answer. The admissions relate only to such matters as: A description of defendant in error's members; a description of the Commission; quotations from the interstate commerce act, and a history of the proceedings before the Commission in which the action of the Commission herein complained of was taken.

II.

The Commission's refusal to make an order awarding reparation to defendant in error's members for said loading services was and is correct.

Upon the facts found by it, as above shown, and as a result of the evidence introduced before it, the Commission concluded that defendant in error's members were not entitled to any reparation, and under these circumstances its refusal to award the reparation was correct. After having discovered, by an examination and consideration of the pertinent facts and circumstances, that defendant in error's members were not entitled to the reparation, the Commission was not required to award the reparation and could not properly have done so. In view of the undisputed facts and circumstances disclosed by the record in this case it is not necessary, nor would it be helpful, to make inquiry concerning the authority the Commission might have exercised if the facts and circumstances had been different and had prompted it to reach a conclusion contrary to the one it reported.

III.

In refusing to fix an allowance as a basis for compensation to be paid for like loading services in the future the Commission did not commit any error.

As stated in Paragraph IV of the petition herein, and also as stated in the Commission's said report, the tariffs of the carriers complained of in the proceeding before the Commission, upon which said report and order are based, provide that the loading services mentioned shall be performed in the future by said carriers. Under these circumstances it is apparent that if the Commission had fixed an allowance for the future in connection with the loading services under consideration there would have been no loading services to which the allowance could have been applied. The refusal of the Commission to fix such an allowance was therefore proper.

IV.

The Court of Appeals erred in holding that it is the duty of the Commission, under paragraph (13) of section 15 of the interstate commerce act, and upon the facts disclosed by the record in this case, to fix and require the payment of compensation for said loading services.

The language of said paragraph (13) is:

> If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the

> Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

In support of its conclusion that the Commission must fix and require the payment of such an allowance, the Court of Appeals called attention to the decision of this court in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42. In this case the question presented for determination was, Whether the Commission could compel the carriers to refrain from paying elevator allowances, under said paragraph (13), in accordance with provisions contained in the carriers' tariffs? The court held, as the Commission has held in this case, that said paragraph did not authorize the Commission to prevent carriers from paying the allowances, but simply empowered the Commission to prevent the payment of excessive allowances. One of the headnotes in the *Diffenbaugh case* reads:

> The interstate commerce act does not attempt to equalize fortune, opportunities or abilities; it contemplates payment of reasonable compensation by carriers for services rendered, and instrumentalities furnished, by owners of property transported, the only

power of the Commission being to determine the maximum of such compensation.

The Court of Appeals referred also to the decisions of this court in *Union Pacific Railroad Company* v. *Updike Grain Company et al.*, 222 U. S. 215, and in *United States* v. *Baltimore & Ohio Railroad Company*, 231 U. S. 274, but we are unable to see wherein those decisions furnish any support for the aforesaid conclusion of the Court of Appeals.

In the *Updike Grain Company Case* this court held to be valid an order of the Commission requiring the Union Pacific to pay elevator allowances in accordance with the provisions of its tariff, which had been found by the Commission to be reasonable; and in the *Baltimore & Ohio Case* this court held to be invalid an order of the Commission requiring certain carriers to refrain from paying allowances to one shipper in accordance with provisions contained in their tariffs for facilities furnished and transportation services performed by it while refusing to pay like allowances to other shippers for facilities furnished and transportation services performed by them. The Commission had found that the facilities furnished and transportation services rendered in both cases were substantially similar, and that by reason of the premises the discrimination practiced by the carriers was unjust. Upon the record in the case, however, this court held that, as a matter of law, the discrimination could not properly be found to be unjust.

If the Commission could have found from the evidence submitted to it that the transportation charges

paid by defendant in error's members were unreasonable, or that the circumstances disclosed by the record made before it constituted either an unjust discrimination or an undue prejudice against said members, and that the latter by reason of the premises had been damaged, the Commission could have issued orders of reparation requiring the carriers to compensate said members for the damages thus brought about, but the evidence submitted to the Commission convinced it that no damages to defendant in error's members had resulted from what had taken place. On the contrary the Commission found that by obtaining from the carriers an opportunity to load their shipments into cars said members secured an advantage over other shippers, and were greatly benefited by being able to ship a much larger tonnage than would otherwise have been possible. In this connection the Commission said:

> * * * For the most part, however, had the shippers insisted on their rights under the tariffs, their paper stock would have been received eventually after long delays along with other commodities and loaded by the carriers. Pursuing such a course, they would not have been able to ship nearly as much as they did, and the expense incident to the delays of trucks standing in long lines together with conveyances of other commodities for hours waiting to unload would have far outweighed the expense of loading the cars by their own employees. If deprived of some portion of this transportation service extended by tariff, due

> to war conditions, these shippers received a consideration for such deprivation. * * *. (Rec. 25.)

If, in the absence of evidence tending to show such unreasonableness, unjust discrimination, or undue prejudice, and simply upon a showing that defendant in error's members had loaded shipments into cars which under the tariffs of the carriers should have been loaded instead by the latter, the Commission had fixed the compensation it deemed to be reasonable for such services, and, by order, required the carriers to make payments accordingly to said members, the Commission would thereby have exceeded its jurisdiction, because, where no provisions concerning the matter are contained in the carriers' tariffs, the Commission is not authorized to enforce, as such, the provisions of contracts, express or implied, entered into by and between carriers and shippers, for the performance by the latter of common-carrier services for the former. It is also true that the Commission has no authority which enables it to compel a common carrier to employ a shipper to perform a common-carrier service.

It is apparent that if the Commission could compel a carrier to employ a shipper to perform one of the duties imposed upon the carrier by law, it could make similar requirements concerning the remainder of said duties and thus leave no duty which the carrier would have the right to perform for itself. In this connection the Commission, in

Armour & Company v. *El Paso & Southwestern Company et al.*, 52 I. C. C. 240, said:

> There is no doubt that if the defendants have equipped themselves with suitable cars to transport shipments offered by the complainants they may refuse to transport the latters' private cars. *Procter & Gamble Co.* v. *C., H. & D. Ry.*, 19 I. C. C., 556, 560; *Atchison Railway Co.* v. *U. S.*, 232 U. S., 199.

In the latter case, at page 214, the court said:

> Whatever transportation service or facility the law requires the carrier to supply, they have the right to furnish. They can therefore use their own cars and can not be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged.

V.

The Commission did not commit any error in refusing to issue an order requiring said carriers to cease and desist from violating certain provisions of said act.

The contention of counsel for defendant in error concerning this matter must mean, if it means anything, that it is the duty of the Commission, where called upon by some party to do so, to issue an order requiring a carrier to obey the law. The Commission, however, has no authority which would enable it to make such an order, nor would a court exercise such an authority in any case.

In this connection counsel for defendant in error called attention to paragraph (1) of section 12 of said act wherein it is provided that "the Commission is hereby authorized and required to execute and enforce

the provisions of this act." They failed to call attention, however, to another portion of said paragraph, which reads:

> and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expense of the courts of the United States.

It will be observed that in a case like the one referred to by counsel for defendant in error the duty of the Commission is not to issue an order requiring a carrier to cease and desist from violating certain provisions of the interstate commerce act, but is instead to request the proper district attorney of the United States to institute a proceeding in court to collect the penalty, or penalties, provided for in such a case by said act.

VI.

The writ of mandamus may not be used as a means of substituting the judgment of the court for the judgment of the Commission, where the Commission does not refuse to act because of an erroneous view entertained by it concerning its jurisdiction.

In *Commissioner of Patents* v. *Whitely*, 4 Wall. 522, the court said:

> The principles of law relating to the remedy by mandamus are well settled.

> It lies where there is a refusal to perform a ministerial act involving no exercise of judgment or discretion.
>
> It lies, also, where the exercise of judgment and discretion are involved and the officer refuses to decide, provided that, if he decided, the aggrieved party could have his decision reviewed by another tribunal.
>
> It is applicable only in these two classes of cases. It can not be made to perform the functions of a writ of error. (Id. 533–534.)

It will be observed that the order of the Commission complained of by defendant in error is what is known as a *negative* order. The decision in *Procter & Gamble Company* v. *United States*, 225 U. S. 282, is therefore important. In that case the Commerce Court had assumed jurisdiction over a negative order of the Commission, and in holding that in doing so that court acted beyond its jurisdiction this court said:

> Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually

to transcend the authority conferred although it may be not technically doing so. * * * (Id. 297–298.)

In view of the provisions of the act to regulate commerce just referred to as originally enacted, of the legislative evolution of that act, its uniform practical enforcement and the constant judicial interpretation which we have thus briefly indicated, it is impossible, we think, in reason, to give to the act creating the Commerce Court the meaning affixed to it by the court below, since to do so would be virtually to overthrow the entire system which had arisen from the adoption and enforcement of the act to regulate commerce. First, because as the previous ascertainment by the Commission on complaint made to it as to whether violations of the act had been committed, with reference to the subjects as to which previous action was required, was an essential prerequisite to a right to complain in a court, the interpretation given below would, by destroying the necessity for the prerequisite, action of the Commission, operate to create a vast body of rights which had no existence at the time the Commerce Court act was passed. Second, because the recognition of a right in a court to assert the power now claimed would of necessity amount to a substitution of the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative. Third, because the result of the interpreta-

> tion would be to bring about the contradiction and the confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against, an interpretation which would seemingly create rights hitherto nonexistent and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the act creates practically valueless. Indeed, these inevitable results of the interpretation given by the court below to the act would necessarily amount to declaring that Congress in seeking to unify and perfect the administrative machinery of the act to regulate commerce and to make more beneficial its operation had overthrown the whole fabric of the system as previously existing. (Id. 298–299.)

Counsel for defendant in error call attention to two mandamus cases, namely, *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, and *Louisville Cement Company* v. *Interstate Commerce Commission*, 246 U. S. 638. In the former this court held that the Commission's conclusion that it did not have jurisdiction over common carriers operating in Alaska, because Alaska was not a Territory within the meaning of the act to regulate commerce, was erroneous, and in the latter the court held that the Commission's conclusion that it did not have jurisdiction over a claim for reparation because the claim accrued when the shipment was delivered by the carrier to the consignee, and was therefore barred by the two-year limitation contained in section 16 of the act, was erroneous, be-

cause, as the act was worded at that time, the claim did not accrue until a later date, namely, the date when the transportation charges were actually paid to the carrier. Pertinent language used by the court in its decision in the Louisville Cement Co. case is as follows:

> That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474. If the Commission did so err, * * * the courts may correct such error on a petition for mandamus, where, as in this case, the erroneous decision can not be reviewed on appeal or writ of error. (Id. 642–643.)

The duty of the Commission to make orders awarding reparation is shown by paragraph (1) of section 16 of said act, which reads:

> That if, after hearing on a complaint made as provided in section 13 of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Having found, as it did, through the proper exercise of its judgment and discretion, that defendant

in error's members had not been damaged in the premises and were not therefore entitled to an award of reparation, it is apparent that the action taken by the Commission in refusing to award reparation is the only action the Commission could properly have taken, because any order it might have made as the result of contrary action would necessarily have been null and void.

Counsel for defendant in error contend that the Commission acted erroneously because, in determining whether defendant in error's members had been damaged, the Commission considered all the evidence instead of confining itself to that portion which tended to show that said members had performed loading services which the carriers' tariffs provided should be performed by them, and were compelled to accept bills of lading indorsed "Shippers load and count." They insist that it was not competent for the Commission to consider the great benefits defendant in error's members derived, by reason of being permitted to load their own shipments into the cars and which they could not otherwise have obtained, and the large expense, incident to delay, which defendant in error's members avoided on account of the loading and other privileges granted to them by the carriers. In other words, as the lower court correctly said, defendant in error's members "seek to have the advantage ignored and only the burden to them considered." Counsel say the fact that the Commission did not content itself with a consideration of a portion of the evidence only proves

that it acted arbitrarily, but we feel certain the court will experience no difficulty in reaching the conclusion that exactly the opposite of this proposition is correct.

For the reasons above set forth we insist that the judgment of the Court of Appeals should be reversed and that the petition in this case should be dismissed.

Respectfully submitted.

P. J. FARRELL,

Counsel for Interstate Commerce Commission,

Plaintiff in error.

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INTERSTATE COMMERCE COMMISSION *v.* UNITED STATES EX REL. MEMBERS OF THE WASTE MERCHANTS ASSOCIATION OF NEW YORK.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 245. Argued October 9, 10, 1922.—Decided October 23, 1922.

Mandamus will not lie to compel the Interstate Commerce Commission to set aside a decision upon the merits and to decide the matter in another, specified way. P. 34.

51 App. D. C. 136; 277 Fed. 538, reversed.

ERROR to a judgment of the Court of Appeals of the District of Columbia reversing a judgment of the Supreme Court of the District (which dismissed a petition for mandamus) and directing that mandamus issue.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. P. H. Marshall, with whom *Mr. Ernie Adamson* was on the brief, for defendants in error.

Mr. Richard W. Barrett, by leave of court, filed a brief as *amicus curiae*.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In March, 1919, the Waste Merchants Association of New York filed with the Interstate Commerce Commission a complaint under § 13 of the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, 384, as amended. It alleged that existing tariffs on paper stock shipped in carload lots from New York Harbor imposed upon carriers the duty of loading cars; that the carriers had failed to perform this duty on shipments made by complainants' members; that these had been obliged to perform the service at their own expense; and that they were entitled, under § 15 of the act, to allowances therefor. The prayer was that the carriers be ordered to pay, by way of reparation, allowances for the loading service and also other damages for violation of law and that the carriers be ordered to observe the law in the future. The Director General of Railroads and one hundred and eighty-four transportation companies were made respondents; extensive hearings were had; the Commission filed a report embodying its findings of fact and conclusions; entered an order dismissing the complaint; and on August 7, 1920, overruled a petition for rehearing based on alleged errors in conclusions of fact and of law and newly discovered evidence. Then, on behalf of the Association members, this petition for a writ of mandamus was filed in the Supreme Court of the District of Columbia. It prayed that the Commission be directed to take jurisdiction of the claims, to allow damages and to fix the amount thereof. Upon a rule to show cause, objection was made to the jurisdiction of the court over the subject-matter; and the case was heard upon demurrer to the answer, which set up more fully the proceedings before the Commission. The Supreme Court of the District dismissed the petition on the ground that the relators, having par-

ticipated in and obtained benefits from the alleged violations of law, were not in a position to complain. Its judgment was reversed by the Court of Appeals of the District, on the ground that upon the facts found by the Commission complainants were clearly entitled to relief. The case was remanded with directions to issue the mandamus. 51 App. D. C. 136; 277 Fed. 538. It is here on writ of error.

We have no occasion to consider the merits of the controversy before the Commission. That it did not dismiss the complaint for lack of jurisdiction is clear. It heard the case fully. It found that the rates charged were not unreasonable or discriminatory in violation of the Commerce Act, nor unreasonable for the service actually performed, in violation of the Federal Control Act. It found that the conditions complained of were an incident of the World War; that the arrangement for loading was a voluntary one beneficial to complainants' members; that there was no provision in the tariffs for allowance to shippers who load cars; and that, therefore, such allowance could not legally be made by the carriers. The Commission dismissed the complaint because it held that the petitioners were not entitled to relief. *Waste Merchants' Association* v. *Director General*, 57 I. C. C. 686.

Petitioners sought in the proceeding to set aside the adverse decision of the Commission on the merits and to compel a decision in their favor. The Court of Appeals granted the writ. This was error. Mandamus cannot be had to compel a particular exercise of judgment or discretion, *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683; *Hall* v. *Payne*, 254 U. S. 343; or be used as a writ of error, *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522. The case at bar is not like *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474, and *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, where the Com-

mission had wrongly held that it did not have jurisdiction to adjudicate the controversy; nor is it like *Kansas City Southern Ry. Co.* v. *Interstate Commerce Commission*, 252 U. S. 178, where the Commission wrongly refused to perform a specific, peremptory duty prescribed by Congress.

Whether a judicial review can be had by some other form of proceeding, we need not enquire. Compare *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114, 116; *Philadelphia & Reading Ry. Co.* v. *United States*, 240 U. S. 334, 336; *Procter & Gamble Co.* v. *United States*, 225 U. S. 282.

Reversed.

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